

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

MAR-LE WENDT, ALBERT D. ROSELLINI
and PACIFIC TELEPHONE & TELE-
GRAPH COMPANY, a Corporation,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Southern Division

FILED

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No. 15116

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the Western District of Washington, Northern Division

No. 3577

MAR-LE WENDT and ALBERT D. ROSELINI,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Comes Now plaintiff Mar-Le Wendt and for cause of action alleges:

I.

That plaintiff is a married woman living separate and apart from her husband and is a citizen of the State of Washington and of the United States, residing within the above described judicial district; that all acts and omissions to act herein complained of took place in the above described judicial district.

II.

That this action arises under the Act of June 25, 1948, 62 Stat. 933, 937; U.S.C. Title 28, Sections 1346(b), 1402(b), as hereinafter more fully appears.

III.

That at all times herein mentioned there was in force that Traffic Code of the City of Tacoma, Washington, Ordinance No. 11701, entitled

“An ordinance regulating travel and traffic on the streets of the City of Tacoma; providing a penalty for the violation thereof; repealing ordinances 10598, 11054, 11385 and 11617, and all ordinances and parts of ordinances in conflict herewith, and declaring that this ordinance shall take effect immediately after publication.”

which was signed by the Mayor of the City of Tacoma, Washington, on June 14, 1939, and became effective on June 26, 1939.

IV.

That at all times herein mentioned, plaintiff Albert D. Rosellini was the owner of a certain 1950 Nash sedan; that at all times herein mentioned plaintiff Mar-Le Wendt was the driver and sole occupant of said Nash sedan.

V.

That at all times herein mentioned one William L. Brown was employed by the United States of America as a unit property custodian for Battery C, 770th A.A.A. Battalion, State of Washington, National Guard; that all acts herein complained of were performed by said William L. Brown within the scope of said employment.

VI.

That on or about the 11th day of March, 1953, at about 11:45 a.m., said William L. Brown was driving a certain two and a half ton truck with attached trailer, north on South Tacoma Way, a pub-

lie highway located partly within the City of Tacoma, Pierce County, State of Washington. That there was no brake hook-up between said truck and trailer. That said truck was owned by the United States of America, and bore license number USA 41188153; that said trailer was loaded with a generator M-1, serial number 055109; that the gross weight of said trailer and generator was 8,100 pounds. That at or near the intersection of the south city limit of the City of Tacoma, Washington, with said South Tacoma Way, the Pacific Telephone and Telegraph Company, a corporation, by its agents, employees and servants, was then and there making repairs to sub-surface telephone lines located under the easterly side of said South Tacoma Way. That a warning sign had been erected south of the point of said repairs by said Pacific Telephone and Telegraph Company; that because of the negligent failure of defendant to provide and use proper and adequate brake connections between said truck and trailer and because of the negligent operation of said truck and trailer by said William L. Brown as he approached said warning sign, said truck and trailer swerved to the left and into the southbound lanes of traffic of said South Tacoma Way striking and colliding with said Nash automobile being operated by plaintiff Mar-Le Wendt in a southerly direction of South Tacoma Way. That said negligence was in violation of the ordinances of the City of Tacoma, Washington, and the laws

of the State of Washington, and the proximate cause of the injuries and damage to plaintiff as hereinafter appears.

VII.

That as a direct and proximate result of the said negligence of defendant, plaintiff Mar-Le Wendt sustained severe and permanent physical injuries and grievous pain of mind and body. That plaintiff has incurred bills for doctors, hospitals and other medical expenses in a sum not presently capable of determination, all to said plaintiff's damage in the sum of \$200,000.00.

For a Second and Separate Cause of Action
Against Defendant, Plaintiff Albert D. Rosellini Alleges:

I.

That plaintiff Albert D. Rosellini is a citizen of the State of Washington and of the United States, residing within the above described judicial district, and at all times herein mentioned was the owner of a certain 1950 Nash sedan automobile.

II.

That plaintiff Albert D. Rosellini by this reference incorporates herein and makes a part hereof as though fully set forth herein, all the allegations contained in paragraphs II through VI, inclusive, of plaintiff Mar-Le Wendt's first cause of action.

III.

That as a direct and proximate result of the said negligence of defendant, the fair market value of plaintiff Albert D. Rosellini's said 1950 Nash auto-

mobile was reduced in the sum of \$2,250.00 from its fair market value immediately preceding said collision. That as a further direct and proximate result of said negligence, said plaintiff lost the use of said automobile for an extended period and was thereby injured to the extent of \$760.00, all to said plaintiff's damage in the sum of \$3,010.00.

Wherefore plaintiff Mar-Le Wendt prays for judgment against defendant on the first cause of action in the sum of \$200,000.00.

Wherefore plaintiff Albert D. Rosellini prays for judgment against defendant in the second cause of action in the sum of \$3,010.00, and for their costs and disbursements herein to be taxed.

/s/ MERWIN E. CASEY,
Attorney for Plaintiffs.

Duly verified.

[Endorsed]: Filed October 15, 1953.

[Title of District Court and Cause.]

No. 3577

ORDER TRANSFERRING CAUSE
TO SOUTHERN DIVISION

The parties hereto by their respective counsel having by stipulation agreed that the proper venue of the above-entitled action is the Southern Division of the Western District of Washington, now, there-

fore, in pursuance of the provisions of Rule 1406, Federal Rules of Civil Procedure, and in the furtherance of justice, it is hereby

Ordered that the above-entitled action be and the same is hereby transferred to the Southern Division of the Western District of Washington, and the Clerk is hereby directed to transmit his file herein to the Southern Division.

Done in Open Court this 11th day of December, 1953.

WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

JOHN E. BELCHER,
Asst. United States Attorney.

Approved for entry, presentation waived.

M. E. CASEY,
Attorney for Plaintiffs.

Certified true copy.

[Endorsed]: Filed December 11, 1953.

United States District Court, Western District
of Washington, Southern Division
No. 1758

MAR-LE WENDT and ALBERT D. ROSEL-
LINI, Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendants.

ANSWER

Comes now the defendant, United States of America, and for its Answer to the complaint and the Cause of Action of plaintiff, Mar-Le Wendt, alleges as follows:

I.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph numbered I of the Complaint and said Cause of Action of the plaintiff, Mar-Le Wendt, and therefore denies the same.

II.

For answer to paragraph II of said Complaint and its Cause of Action first stated, defendant denies that this action arises under the Act of June 25, 1948, 62 Stat. 933, 937; U.S.C. Title 28, Sections 1346(b), 1402(b), for the reasons hereinafter more fully stated in its affirmative defense hereto.

III.

Defendant admits the allegations contained in paragraphs III and IV of said Complaint and its Cause of Action first stated.

IV.

Answering paragraph V of said Complaint and said Cause of Action, defendant admits that at the time mentioned therein William L. Brown was a unit property custodian for Battery C, 770th A.A.A. Battalion, State of Washington, National Guard, but denies each and every other allegation therein contained, and especially denies that said William L. Brown was at said time employed by the United States of America in the alleged capacity or in any other capacity whatsoever.

V.

For Answer to paragraph VI of said Complaint and said Cause of Action, defendant admits that at about the time and at the place mentioned therein, said William L. Brown was driving a certain two and a half ton truck with attached trailer, north on South Tacoma Way, a public highway located partly within the City of Tacoma, Pierce County, State of Washington, and that said truck was owned by the United States of America, and bore license number USA 41188153. Defendant further admits that at or near the intersection of the south city limit of the City of Tacoma, with said South Tacoma Way, the Pacific Telephone and Telegraph Company, a corporation, by its agents, employees and servants, was then and there making repairs to sub-surface telephone lines located under the easterly side of South Tacoma Way, and that as said truck and trailer approached the point of said repairs the truck collided with said Nash automobile being operated by plaintiff Mar-Le Wendt in

a southerly direction on South Tacoma Way; that as to each and every other allegation and thing contained in said paragraph VI defendant denies the same, and particularly denies that defendant or said William L. Brown, said driver, were in any wise negligent or in any respect responsible for the accident therein mentioned, and in this connection defendant states that said William L. Brown was operating said truck and trailer in the manner provided by law, as is more particularly hereinafter set forth in the affirmative part of defendant's answer.

VI.

For answer to paragraph VII of the Complaint and said Cause of Action, this defendant alleges that if the plaintiff Mar-Le Wendt suffered any injuries, as the same are therein alleged, that such injuries were caused without any neglect or fault on the part of this defendant or the driver of said truck, and particularly denies that said plaintiff named herein has been damaged in the sum of \$200,000.00 as therein set forth, or in any other sum whatsoever, by reason of any negligence on the part of this defendant or of the driver of the said truck.

For Answer to the Complaint and Cause of Action of Plaintiff Albert D. Rosellini Above Named, Defendant Alleges as follows:

I.

Defendant admits the allegations contained in paragraph I of the Second Cause of Action contained in said Complaint.

II.

Answering paragraph II of said Complaint and said Cause of Action, defendant refers to paragraphs II through V, inclusive, of defendant's Answer to the Complaint and Cause of Action of plaintiff Mar-Le Wendt and by this reference incorporates the same herein.

III.

For answer to paragraph III of the Complaint and said Cause of Action, this defendant alleges that if the plaintiff Albert D. Rosellini suffered any damages, as the same are therein alleged, that such damages were caused without any neglect or fault on the part of this defendant or the driver of said truck, and particularly denies that said plaintiff Albert D. Rosellini has been damaged in the sum of \$3,010.00, as therein set forth, or in any other sum whatsoever, by reason of any negligence on the part of this defendant or of the driver of said truck.

Further answering plaintiffs' complaint, and by way of a First Affirmative Defense thereto and each Cause of Action, this defendant alleges:

I.

That at the time of the accident mentioned in the Complaint, William L. Brown therein mentioned was an employee of the State of Washington Military Department and in addition to operator of said truck was a Unit Material Caretaker for Battery C, 770th A.A.A. Gun Battalion, and was driving said truck, a 2½-ton 6x6, GMC Cargo, Model M211,

loaded with a truck, 1/4-ton 4x4 and towing Trailer, Generator, M7, loaded with a Director, M9, and transporting said unit equipment to Seattle, Washington, which truck and the accountability therefor had theretofore been transferred to the State of Washington and the unit mentioned herein, and neither the unit of which said William L. Brown, a master sergeant therein, was a member, nor the sergeant himself, were in the active federal military service at the time of said accident, nor was he an employee of the federal government acting within the scope of any federal office or federal employment at the time in question within the meaning of the statute whereby the United States of America has consented to be sued for and on account of the negligent or wrongful acts or omissions of any of its employees while acting within the scope of his office or employment, and for such reason this defendant also disclaims liability for any damages allegedly incurred by the plaintiffs on account of any alleged negligence on the part of said William L. Brown.

By Way of a Second Affirmative Defense to Plaintiff's Complaint and Each Cause Thereof, This Defendant Alleges:

I.

That at all times mentioned in plaintiff's Complaint there was in force and effect an Ordinance of the City of Tacoma, Washington, Ordinance No. 12947, entitled:

“An ordinance relating to and regulating the obstruction of streets, alleys and public

places of the City of Tacoma, providing penalties for the violation thereof and repealing Ordinances Nos. 2239, 3257 and 9895''

which was signed by the Mayor of the City of Tacoma, Washington, on October 9, 1946, and became effective on October 21, 1946.

II.

That at all times mentioned herein and material hereto, plaintiff Mar-Le Wendt was the agent and employee of plaintiff Albert D. Rosellini and was acting within the course and scope of her employment, for and in his behalf, with his consent, and at his direction.

III.

That if the plaintiff Mar-Le Wendt suffered any injury to her person, and if the plaintiff Albert D. Rosellini suffered any damage to his property, as set forth in their complaint, as their respective causes of action herein, such injury and any other damage, if sustained, were not caused by reason of any act, omission or negligence on the part of the defendant, or on the part of said William L. Brown, the driver of said truck, but, if sustained, were directly and proximately caused by the negligent acts and omissions of the Pacific Telephone and Telegraph Company, its agents, servants and employees, who at the time and place herein mentioned and material hereto, and while acting within the scope of their employment were on behalf of said company making repairs to its sub-surface telephone lines located under the easterly side of South Tacoma Way, a public highway, at a point thereon

within the corporate limits of said City of Tacoma; and in addition thereto any injury or damage so sustained were also directly and proximately caused by the negligence and omissions of plaintiff Mar-Le Wendt, the driver of the Nash automobile owned by plaintiff Albert D. Rosellini.

IV.

That said Pacific Telephone and Telegraph Company, its agents, servants and employees, were negligent in the premises in that they negligently failed to post and maintain proper and adequate signs or warnings a sufficient distance to the south of said point of repairs, thereby causing the truck being driven by said William L. Brown in a northerly direction along said South Tacoma Way to swerve into the southbound lanes of traffic of said South Tacoma way and to strike and collide with said Nash Automobile being operated in a southerly direction thereon, which negligence on the part of said company, its agents, servants and employees was in violation of the ordinances of the City of Tacoma, Washington, and of the laws of the State of Washington.

V.

That plaintiff Mar-Le Wendt was negligent in the following particulars:

1. Operating the vehicle being driven by her at an excessive and unlawful rate of speed under the conditions and circumstances then and there existing.
2. Failing to keep a lookout for other users of

the highway, and especially of the vehicle being driven by William L. Brown.

3. Failing to keep her vehicle under control.

4. Failing to exercise reasonable care to avoid said collision, when she saw the peril to herself and said William L. Brown, or should have seen the same, and that a collision between the vehicles being driven by each of them was imminent.

Wherefore, having fully answered, defendant prays that this action and the Complaint of plaintiffs, Mar-Le Wendt and Albert D. Rosellini, be dismissed, and that defendant have its costs and disbursements herein to be taxed as provided by law.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ GUY A. DOVELL,
Assistant United States At-
torney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 8, 1954.

[Title of District Court and Cause.]

MOTION TO STRIKE

Come Now the plaintiffs and respectfully move the court for an order striking defendant's first affirmative defense from its Answer on the ground that no defense to plaintiffs' causes of action is therein stated.

/s/ ROSELLINI & CASEY,
Attorneys for Plaintiffs.

[Endorsed]: Filed January 27, 1954.

[Title of District Court and Cause.]

No. 1758

ANSWERS TO INTERROGATORIES DIRECTED TO DEFENDANT UNITED STATES OF AMERICA BY PLAINTIFF

Comes now the United States of America, the defendant named in the above-entitled action, and submits its answers to those certain interrogatories heretofore served upon it by plaintiff, to wit:

(The following numbers refer to the number of interrogatory.)

1. William L. Brown who resides at 624 7th Avenue, Kirkland, Washington.

2. The occupation of the driver at the time of the accident was Unit Material Caretaker of Battery "C," 770th AAA Gun Battalion, a unit of the National Guard of the State of Washington.

3. The driver was employed by the National Guard of the State of Washington.

4. The driver was a member of, and employed as caretaker of Battery "C," 770th AAA Gun Battalion, a unit of the National Guard of the State of Washington. The Commanding Officer of this unit was First Lieutenant Marvin G. Wubbins, of the Washington National Guard.

5. The driver was customarily paid by a Department of the Treasury check by the finance officer designated to pay all National Guard vouchers for the National Guard of the State of Washington.

The funds are drawn from those allotted by the Secretary of the Army to the State of Washington for the support of its National Guard, under the authority of Section 90, National Defense Act, as amended.

6. The driver was employed full time. His duties were to perform maintenance, at the organizational level, on the equipment for which the unit commander was the responsible officer and individual, and all other like duties prescribed by the unit commander and the Adjutant General of the State of Washington.

7. The driver received no additional compensation or pay.

8. The files of this office reveal that the driver did hold a valid State of Washington driver's license.

9. This office has been unable to ascertain whether the driver held a United States Army driver's license. It would seem, however, that this question is irrelevant.

10. At the time of the accident, the driver was operating the vehicle on the business of and in behalf of his unit of the National Guard of the State of Washington, on the authority of Special Orders No. 67, dated 8 March, 1953, issued by the Adjutant General of the State of Washington, copies of which would be available at that office.

11. This is a theoretical question, irrelevant and inapplicable in the instant case, and calling for a legal conclusion available to the plaintiffs. Answer is declined, unless otherwise directed.

12. At the time of the accident the driver was under the control and supervision of his commanding officer, First Lieutenant Marvin G. Wubbins, and the Adjutant General of the State of Washington. Both of these individuals are members of the Washington State National Guard, and their addresses are contained in the records thereof.

13. The unit of the National Guard of the State of Washington by which the driver was employed was subsidized by federal funds appropriated annually for the support of the National Guard of the State and Territories by authority of Section 67, National Defense Act, as amended. The unit was not subject to federal supervision, except that it was required to maintain certain standards of training and maintenance of equipment as a prerequisite to federal recognition, upon which depended its access to federal funds. The annual inspection for federal recognition covers the matters of: (a) amount and condition of the property in the hands of the unit; (b) whether the unit is properly organized; (c) whether the officers and enlisted men meet the prescribed qualifications; (d) whether the officers and enlisted men are properly armed, equipped, uniformed, and being trained and instructed adequately; (e) and whether records are being kept according to the provisions of the National Defense Act. The reports of such inspections shall serve as the basis for deciding as to the issue to and retention by the National Guard unit of the Military property provided, and for determining

what organizations and individuals shall be considered as constituting parts of the National Guard. Section 93, National Defense Act.

14. Title to the truck and trailer were in the United States. The responsible officer was First Lieutenant Marvin G. Wubbins. The accountable officer was the Acting United States Property and Disbursing Officer for the State of Washington, under provisions of Section 67, National Defense Act. The accountability was transferred for the trailer in August, 1948, from the Department of the Army to the United States Property and Disbursing Officer for the State of Washington. Accountability for the truck was likewise transferred on 18 November, 1952.

15. The purpose of the trip was to transport vehicles and supplies in behalf of, and on the business of Battery "C," 770th AAA Gun Battalion, a unit of the National Guard of the State of Washington.

16. It is unknown where the driver picked up or received the vehicle. As these vehicles are in the possession of the unit of the National Guard of the State of Washington to which assigned, it is suggested that the information as to whether the driver signed any documents be obtained from him, or the National Guard of the State of Washington.

17. This information should also be available in the records of the National Guard of the State of Washington.

18. The truck was a General Motors Corporation 21½ Ton Cargo Truck 6 x 6, Stock Number 557. The trailer was a Trailer Generator, M7.

19. This office has been unable to ascertain this information. As the vehicles are in the possession of the unit of the National Guard of the State of Washington to which assigned, it is suggested that the information be sought there.

20. The question as to the operation of the brakes should also be obtained from the National Guard of the State of Washington. The gross weight of the truck was 12,850 pounds, and that of the trailer 4,150 pounds.

21. This information will likewise have to be obtained from the National Guard of the State of Washington.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ GUY A. B. DOVELL,
Assistant United States Attorney, Attorneys for
Defendant, United States of America.

United States of America,
Western District of Washington,
Southern Division—ss.

Guy A. B. Dovell, being first duly sworn, on oath deposes and says:

That he is an Assistant United States Attorney, and one of the attorneys for the defendant, United States of America, herein; that he has prepared the foregoing answers to interrogatories from informa-

tion made available to him through official communication with the Judge Advocate General's Office of the Department of the Army, and that to the best of his knowledge and belief, the said answers are true; that this affiant is verifying said answers to interrogatories for the reason that no official of the Department of the Army is presently available for executing this verification.

/s/ GUY A. B. DOVELL.

Subscribed and sworn to before me this 8th day of September, 1954.

/s/ ROSEMARY D. SWEENEY,
Deputy Clerk, United States District Court, Western District of Washington.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Sept. 8, 1954.

[Title of District Court and Cause.]

No. 1758

DEFENDANT'S MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION TO
STRIKE

As a First Affirmative Defense to plaintiffs' action, defendant United States of America has set up the defense that Sergeant William L. Brown, described in the complaint as a unit property custodian of the Washington National Guard, was not

at the time in question employed by the United States in any capacity.

This contention is factually supported by the personnel records obtained from the Military Department, State of Washington, which discloses the following:

1. That on 22 December, 1950, the Commanding Officer of the Clearing Company, 116th Medical Battalion, Washington National Guard, filed a request with the Adjutant General, State of Washington, that Sergeant William L. Brown, a member of that organization, be employed as a civilian maintenance employee for this unit at a starting salary of \$2,800.00 annually.

2. That on 4 January, 1951, the office of the Adjutant General, State of Washington, issued Special Orders No. 4 by Direction of the Governor, paragraph 3 of which appointed Sergeant Brown unit caretaker of the organization requesting the appointment;

3. That on 22 February, 1951, the office of the Adjutant General, State of Washington, issued Special Orders No. 53 by Direction of the Governor, paragraph 9 of which order granted Sergeant Brown, and others named therein, within grade promotions and increased pay;

4. That on 25 September, 1951, the office of the Adjutant General, State of Washington, issued Special Orders No. 268 by Direction of the Governor, paragraph 1 of which granted Sergeant Brown a further raise in pay;

5. That on 13 January, 1952, the office of the Adjutant General, State of Washington, issued Special Orders No. 13 by Direction of the Governor, granting Sergeant Brown and others named therein, an adjusted salary scale and retroactive pay;

6. That on 2 October, 1952, the Commanding Officer of the Clearing Company, 116th Medical Battalion, requested that the Adjutant General, State of Washington, terminate the services of Sergeant Brown as unit cartaker of that organization;

7. That simultaneous to request mentioned in preceding paragraph (6), the Commanding Officer of Battery C, 770th AAA Gun Battalion, Washington National Guard, requested that Sergeant Brown be appointed as unit caretaker of that organization;

8. That on 12 October, 1952, the Office of the Adjutant General, State of Washington, issued Special Orders No. 286 by Direction of the Governor, paragraphs 1 and 2 of which order terminated Sergeant Brown's appointment as unit caretaker of the Clearing Company, 116th Medical Battalion, and appointed him unit caretaker of Battery C, 770th AAA Gun Battalion;

9. And that on 8 March, 1953, the Office of the Adjutant General, State of Washington, issued Special Orders No. 67 by Direction of the Governor, whereby Sergeant Brown, and others named

therein, were to proceed from Seattle to Camp Murray for the purpose of transporting vehicles and supplies of the National Guard, the trip on which Sergeant Brown was engaged at the time of the accident which gave rise to this action.

It is especially worthy of notice that in the entire history of Sergeant Brown's employment, from the moment when it was first recommended, no official, officer, or employee of the Federal Government is directly involved in the transactions from which stems Sergeant Brown's status.

The defendant in support of the actual facts must oppose the basic assumption relied upon by the Tenth Circuit in its decision in the case of *U. S. v. Holly*, 192 F. 2d 221, namely, that the Adjutant General of a State, or the Governor by whose direction and in whose name he acts, are acting as agents of the Secretary of the Army in the hiring, firing, direction and control of unit caretakers. Such assumption is completely fallacious and untenable.

Obviously, unless this fiction is resorted to, the Court cannot point out one single element of control exercised by officers or officials of the Federal Government, or the presence of any of the other ordinary factual and legal attributes that encompass the employer-employee relationship as commonly known.

If the argument was advanced that the Secretary of the Army could terminate this so-called agency relationship created by the fiction of the *Holly* case, if dissatisfied with the service performed or for any other reason a principal can terminate an

agency, such an argument would be patently facetious.

The Secretary of the Army is without any authority to control the Adjutant Generals of the States, and, consequently, the essential elements of an agency relationship simply do not exist. Historically speaking, the relationship between the National Guards of the States and Territories and the Federal Government, as represented by the Department of the Army, has been and still is characterized by the resistance of the States and their National Guards to any encroachment by the Federal Government on the authority and integrity of the National Guard as a State institution within the framework of the Constitution. The principal purpose of such regulations as are issued by the Secretary of the Army pertaining to unit caretakers is to achieve uniformity between the various States, and to create minimum operational standards. Adherence to the regulations and standards imposed then becomes the criteria for determining whether federal funds are allotted or withheld. To the same degree, regulations prescribe the pay and emoluments of the ordinary guardsman, enlisted or officer; and other regulations set up standards of training and proficiency which must be met if federal recognition is extended to the individual guardsman and his unit, as a condition precedent to the allocation and release of the funds appropriated by Congress from which all guardsmen are paid, including such civilian employees as caretakers, etc. In other

words, such control as is or can be exercised by the Secretary of the Army acting through the National Guard Bureau and regulations issued thereby, is of the persuasive character inherent in the Secretary's authority over allocations of federal funds to the support of the National Guard of the States and Territories.

See in the above connection, *U. S. v. Dern*, 74 F. 2d 485.

In *United States v. Holly*, 192 F. 2d 221, at page 223, the Court, after reviewing directive statutes and regulations, arrives at the conclusion:

“There is present every element necessary to constitute a unit caretaker an employee of the United States.”

In support of this proposition, the Court cites three cases, namely, *Singer Manufacturing Co. v. Rahn*, 132 U. S. 518; *United States v. Wholesale Oil Co., Inc.*, 10th Cir. 154 F. 2d 745; and *Jones v. Goodson*, 10 Cir., 121 F. 2d 176.

In the *Singer* case, *supra*, the Court at page 523, held:

“In short, Corbett, for the commissions to be paid him, agrees to give his whole time and services to the business of the Company; and the Company reserves to itself the right of prescribing and regulating not only what business he shall do, but the manner in which he shall do it; and might, if it saw fit, instruct him what route to take, or even at what speed to drive.”

If the Congress had intended to utilize federal employees to take care of Government property loaned to the States, certainly Sec. 42, Title 32, U. S. Code, was a roundabout expression for any such purpose. The protection of Government funds as expressed in the last proviso of that section could not reasonably be considered a contract engaging federal civilian employees.

If the Court, in *U. S. v. Holly*, *supra*, had given consideration to the facts of employment rather than misinterpreting the purpose of a regulatory standard for service entitling the use of federal funds in payment of such service, the Court might consistently have arrived at the administrative construction placed upon the position of unit caretakers. Instead, the Court preferred to read into the regulations a meaning of employment never intended by Congress either in connection with the National Guard legislation nor the Federal Tort Claims Act. Upon the faulty premise of the *Holly* case, two more decisions, namely, *Elmo v. U. S.*, 197 F. 2d 230, and *U. S. v. Duncan*, 197 F. 2d 233, have followed.

In addition to what has been said relative to the lack of support of the *Singer* case, cited by the Court in the *Holly* case, neither of the other two cases cited appear to lend any support.

The *Wholesale Oil Co.* case, *supra*, involved the question of whether a station operator was an employee or an independent contractor of the Oil Company under their contract of operation. The *Good-*

son case also involved the question of Social Security Taxes in the case of the driver for a taxicab operating company. However, it is upon these three cases the Court in the Holly case found and determined a legal basis for the conclusion quoted above, namely:

“There is present every element necessary to constitute a unit caretaker an employee of the United States.”

All three cases cited in the Holly case involved the issue of whether or not the party in question was an employee of the Company involved or an independent contractor.

Such was never the issue in any of the three cases which now hold the unit caretaker to be a federal employee.

Defendant must point to the fact that the limitations on the National Guard Unit caretaker's relations with the United States are so clearly fixed by Title 32, U. S. Code, Secs. 42 and 42a, that it cannot be reasonably contended such caretaker may at any time act in an “official capacity” on behalf of a Federal agency within the contemplation of the Federal Tort Claims Act, which states:

“‘Employee of the government’ includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, tem-

porarily or permanently in the service of the United States, whether with or without compensation.”

Nor can it be reasonably contended that the National Guard is a federal agency or that National Guard unit caretakers are officers of a federal agency. For the reason the power of appointment must be vested in a source recognized by the Constitution as appropriate to the appointment of federal officers.

With all due respect to the Court’s determination in the Holly case, still it should be observed that no National Guard unit caretaker exercises any of the sovereign power of the United States, none holds an appointment from the President, the Secretary of Defense, or the Secretary of the Army; and none executes an oath of office or files the affidavit relative to non-assistance in obtaining the appointment required of all federal officers.

In *United States v. Dern*, *supra*, decided December 3, 1934, the Court of Appeals for the District of Columbia in a mandamus proceeding involving right to retention of a Government pension while serving as brigadier general of the line of the National Guard of the State of New York, at page 486 of the reporter, observed:

“Under the provisions of this act (National Defense Act, 39 Stat. 166) petitioner, as brigadier general in the New York National Guard, was charged with the duty of instructing in

military science the infantry regiments maintained by the state as part of its National Guard. He likewise had authority over the fiscal affairs of certain of the armories in the state and supervisory authority over federal military property and supplies loaned or furnished the State by the federal government.”

(Underscoring supplied.)

* * *

“The United States has not appointed, and constitutionally cannot appoint or remove (except after being called into federal service), officers of the National Guard for there must be a State National Guard before there can be a National Guard of the United States, and the primary duty of appointing the officers is one of the powers reserved to the states. But while this is true, it is also true that Congress has authority to determine the extent of the aid, support, and assistance which shall be given the National Guard of the various states and the terms upon which it shall be granted. Houston v. Moore, 5 Wheat. 16, 5 L. Ed. 19. This flows from the power to organize, arm, and discipline. But, except when employed in the service of the United States, the whole government of the militia is within the province of the state, and this follows because of the precise limitations of the constitutional grant. The United States may organize, may arm and may discipline, but all of this is in

contemplation of, and preparation for, the time when the militia may be called into the national service. Until that event, the government of the militia is committed to the states. People v. Hill, 126 N. Y. 497, 27 NE. 789. From this it follows that petitioner's argument that he is an officer of the Army and subject to discipline or removal in accordance with the Articles of War is without foundation. Nor is there any more doubt that Congress has the power to withhold federal recognition from all or any part of the militia in its discretion, or to impose the conditions of its acceptance. This power is a necessary attribute of the Constitutional grant." (Underscoring supplied.)

Certainly the foregoing decision should dispel the fictitious idea that the Federal Government is maintaining a "watchguard" in the National Guard units of the various states.

Plaintiffs in their brief advance the idea that Sergeant Brown would receive United States Employees' Compensation in case of death or disability. The United States Employees' Compensation Commission is the only federal agency which has treated the unit caretaker as a federal employee. Needless to say that the Department of the Army considers this agency 100% wrong in its conclusions.

However, it might be said, that in the field of compensation there has often appeared to exist gaps or "twilight zones" in which some agency has, in the absence of specific designation, stepped into the

unclaimed domain, and administered needed relief. This has not been held determinative of character of employment.

See *Western Boat Building Co. v. O'Leary*, 198 F. 2d 409.

State judicial decisions emphasize that members and employees of the National Guard, not in active service, are State employees. There is no indication, judicial, legislative or administrative, that Congress intended to change the status of these people, by the enactment of the Federal Tort Claims Act.

Workmen's Compensation Act decisions have occasioned most of the judicial discussion on the subject.

In Washington and Illinois a guardsman is a State employee, although the legislature did not provide coverage for guardsmen under the Compensation Act.

See *Thompson v. Dept. of Labor and Industries*, 78 P. 2d, 170 (1938); *Rector v. Cherry Valley Timber Co.*, 196 P. 653 (1921); and *Hays v. Illinois Terminal Association*, 2 N.E. 2d 309 (1936).

In Wisconsin, North Carolina, Idaho, Virginia and Oklahoma, guardsmen are recognized as State employees under local compensation statutes.

State v. Johnson,
202 N.W. 191 (Wis., 1925);

Baker v. State,
156 S.E. 917 (N. C., 1931);

Griffith v. National Guard,
212 P. 2d 403 (Ida., 1949) ;

Globe Indemnity Co. v. Forrest,
182 S.E. 215 (Va., 1935) ;

Mountcastle v. State,
145 P. 2d 392 (Okla., 1943).

In New York and Nebraska their State status is recognized.

Gibson v. State,
19 N. Y. S. 2d 405 (1940) ; and

Nebraska National Guard v. Morgan,
199 N.W. 557 (1924).

If the conclusion of the agency involved, the Department of the Army is entitled to be given weight, then it must be stated that the Army remains of the view consistently taken in National Guard caretaker cases, namely, that individuals occupying this status are State employees, and stand in no different position than that of any other National Guardsman not in active federal military service. In a long line of unbroken decisions, the most recent of which is *McCranie v. United States*, 199 F. 2d 581, cert. den. (1952), it has been held that members of a State National Guard, who are not in active military service, are not federal employees. There appears no reasonable grounds for making an exception in case of a member designated as a "unit caretaker."

Again, it should be borne in mind that Sergeant Brown was not only engaged on a trip ordered and

directed by the Adjutant General of the State of Washington, but the vehicle he was operating was one the possession of which had been transferred to the Washington National Guard. This transfer of possession and control to the Washington National Guard in effect constituted a bailment.

In order to observe the Congressional estimate of the status of Reserve and National Guard Forces of the Armed Services, we refer to the Report of the Interim Subcommittee on Preparedness of the Committee on Armed Services, United States Senate, under authority of Senate Resolution 86 (83rd Congress), as submitted by Senator Saltonstall, Chairman, which report at page eleven thereof, with reference to the Air National Guard, reads:

“Each wing has permanent personnel who administer the program and maintain the equipment. They are State employees paid with Federal funds. There are 7,000 men presently in this category. These men are also members of the guard, go with the units when called to active duty, and augment and facilitate the training program to a considerable extent.”

Summary

The rationale of the decisions in the three cases which held that the National Guard unit caretaker is an employee of the United States, rather than the State in which he is employed, is not in accord with the large body of administrative law and decisions pertaining thereto. The position taken by

the Government in this memorandum is as follows:

1. National Guard unit caretakers are not Federal employees, inasmuch as every Federal administrative agency having occasion to deal with the problem, with but one exception, has held that they are State employees;

2. Although authorized by Federal statute, the caretaker is hired and fired by State authorities, subject only to approval by the Secretary of the Army;

3. The Courts of the several States though never presented with the exact problem, have consistently recognized and emphasized that guardsmen and employees of the National Guard are essentially State employees;

4. It is a demonstrable non sequitur to state that because of the regulatory powers exercised by the Department of the Army and Air Force and the National Guard Bureau over the caretaker he is a federal employee, although the guardsman himself is not a federal employee;

5. The background, both legally and historically, of the National Guard supports the position here advocated;

6. The Congressional purpose in providing funds for the employment of the caretaker was to assure the federal property loaned to the State would be properly cared for rather than evidencing an intention to create an "office" or "position" federal in character;

7. The legislative history of the caretaker clearly

indicated he has always been considered a State employee by the Federal Government;

8. The National Guard Bureau, the Department of the Air Force, and the Department of the Army, the regulations of which were relied upon by the Holly Court, have never considered that the unit caretaker was a federal employee;

9. The caretaker cannot be considered a federal employee inasmuch as he is not employed by a federal agency, and his employment is not characterized by any of the indicia of federal employment.

In summation, when the position and duties of the caretaker are analyzed in detail and in the fullest sense, it will be seen that his primary relationship is to the State, rather than to the United States. His duty to protect the property assigned to his unit is primarily concerned with protecting the State from liability for loss or destruction of this property. If the property remained in federal custody, why should the State be liable? The State is responsible for the equipment and other material loaned to it and must account for all property received from the United States, otherwise it must pay the loss. In protecting the State, and as a practical matter, the caretaker is told what to do, where to go, and how to do it by State authorities, and not by representatives of the Federal Government. The control thus vested in the State is that which traditionally and legally establishes the relationship of employer-employee.

In addition to the foregoing, it is the defendant's contention, Article 1, Sec. 8, Clause 16, which grants the authority and power to Congress:

“To provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the Service of the United States, reserving to the States, respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline Prescribed by Congress,”

does not authorize Congress to appoint officers of the National Guard, nor take from the President of the United States the power to appoint all Officers of the United States (Article 2, Sec. 2), nor place within the power of the Judiciary or the Congress the right to create and establish a federal office within the Structure of a State National Guard.

See U. S. v. Dern, *supra*.

Respectfully submitted,

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ GUY A. B. DOVELL,
Assistant United States
Attorney.

[Endorsed]: Filed Sept. 24, 1954.

United States District Court, Western District of
Washington, Southern Division

No. 1747

MAR-LE WENDT and ALBERT D. ROSEL-
LINI,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant,

and

MAR-LE WENDT and ALBERT D. ROSEL-
LINI,

Plaintiffs,

vs.

PACIFIC TELEPHONE & TELEGRAPH COM-
PANY, a Corporation,

Defendant.

ORDER OF CONSOLIDATION

The parties in the above-entitled actions having by oral stipulation in open court on the 4th day of October, 1954, agreed that the above-entitled actions should be consolidated for purposes of trial and appeal, now, therefore, it is hereby

Ordered that the above-entitled actions be and the same are hereby consolidated for purposes of trial and appeal.

Done in Open Court this 19th day of October,
1954.

/s/ GEO. H. BOLDT,
Judge.

Presented by:

/s/ GUY A. B. DOVELL,
Assistant United States Attorney, Attorneys for
Defendant United States of America.

Approved for entry:

/s/ M. E. CASEY,
Of Rosellini & Casey, At-
torneys for Plaintiffs.

/s/ DONALD D. MacLEAN,
Of Attorneys for Defendant Pacific Telephone and
Telegraph Company.

[Endorsed]: Filed Oct. 19, 1954.

[Title of District Court and Cause.]

Nos. 1758 and 1747

PRE-TRIAL ORDER

As a result of a pre-trial conference held on the 1st day of April, 1955, plaintiffs, being represented by Merwin E. Casey of Casey & Pruzan, defendant United States of America being represented by Guy A. B. Dovell, assistant United States Attorney,

defendant Pacific Telephone & Telegraph Company being represented by McMicken, Rupp & Schweppe, the following issues of fact and law were framed and exhibits identified:

Admitted Facts

1. That at all times herein mentioned plaintiff Mar-Le Wendt was a married woman living separate and apart from her husband, and was a citizen of the State of Washington and of the United States, residing within the above-described judicial district; that all acts and omissions to act herein complained of took place in the above-judicial district.

2. That at all times herein mentioned plaintiff Albert D. Rosellini was a citizen of the State of Washington and of the United States, residing within the above-described judicial district, and was at all times herein mentioned the owner of a certain 1950 Nash sedan automobile. That all acts and omissions to act complained of took place in the above-described judicial district.

3. That defendant Pacific Telephone and Telegraph Company is a corporation duly organized and existing under and by virtue of the laws of the State of California, authorized to transact business and transacting business in the State of Washington and in the above-described Judicial District. That the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

4. That at all times herein mentioned there was

in force that Traffic Code of the City of Tacoma, Washington, Ordinance No. 11701, entitled:

“An ordinance regulating travel and traffic on the streets of the City of Tacoma; providing a penalty for the violation thereof; repealing ordinances 10598, 11054, 11385, and 11617, and all ordinances and parts of ordinances in conflict herewith, and declaring that this ordinance shall take effect immediately after publication.”

which was signed by the Mayor of Tacoma on June 14, 1939, and became effective on June 26, 1939. Said Traffic Code is contained in a pamphlet designated, “Tacoma Traffic Code, Ordinance 11701, as Amended to June 16, 1952.”

5. That at all times herein mentioned there was in force an Ordinance of the City of Tacoma, Washington, Ordinance No. 12947, entitled:

“An Ordinance relating to and regulating the obstruction of streets, alleys and public places of the City of Tacoma, providing penalties for the violation thereof and repealing Ordinances Nos. 2239, 3257, and 9895.”

signed by the Mayor of Tacoma on October 9, 1946, and became effective October 21, 1946, which Ordinance was amended by Ordinance No. 14124, passed by the City Council of Tacoma on March 14, 1951, published March 15, 1951.

6. That plaintiff Mar-Le Wendt was the driver and sole occupant of said Nash automobile.

7. That on March 11, 1953, William L. Brown, Serial No. 28994242, was a sergeant in Battery C, 770th AAA Battalion, State of Washington National Guard, stationed at Seattle, Washington. That he was paid therefor \$6.18 per drill, on a quarterly basis, by check issued by the United States Army Finance Center, Seattle. That on said date, Brown was also a full-time civilian "Administrative, Supply and Maintenance Technician" in Battery C, 770th AAA Battalion, having been so appointed by Par. 2, Special Order 286, Headquarters Military Department, State of Washington, Office of the Adjutant General, dated October 12, 1952, effective October 16, 1952. That he was paid therefor \$3,695.70 annually, on a monthly basis, by check issued by the United States Army Finance Center, Seattle, from funds separate from those received as a member of the National Guard.

8. That all acts referred to as having been done by William L. Brown were done by him under the authority of and strictly in accordance with Paragraph 3, Special Order 67, Headquarters Military Department, State of Washington, Office of the Adjutant General, Camp Murray, Washington. That said Special Order was directed to said Brown as Unit Material Caretaker in said Battery C.

9. That by virtue of Departments of the Army and the Air Force National Guard Bureau, Washington 25, D. C., NG-ARPC 231 General, dated December 22, 1952, subject: Revised Field Civilian Personnel Program—Project 1213, directed to the

Adjutants General of all States, Alaska, Hawaii, Puerto Rico and the District of Columbia, the title of "Unit Materiel Caretaker" or "Unit Caretaker" was changed to "Administrative, Supply and Maintenance Technician," and qualifications and job specifications were set forth. That said publication was in full force and effect on March 11, 1953.

10. That on March 11, 1953, Brown drove a National Guard vehicle to Camp Murray for the purpose of transporting vehicles and supplies from Camp Murray to Battery C in Seattle.

11. That upon arrival at Camp Murray on March 11, 1953, Brown took delivery of and receipted for one truck, cargo, two and one-half ton, 6 x 6, M 211, U. S. A. No. 41188153, with equipment, and prepared to return to said Battery C in Seattle, Washington. That at the same time and place, one Stanley DeArment, Administrative Supply and Maintenance Technician for Battery B, 770th AAA Gun Battalion, Washington National Guard, stationed at Seattle, Washington, took delivery of one M 9A2 Director, mounted on a M 7 generator trailer, U. S. A. No. 055109, and one quarter-ton 4 x 4 utility M 3 8A1 truck, U. S. A. No. 20961521. That said quarter-ton truck was loaded into the rear of the said two and one-half-ton truck and that the said M 7 generator trailer, U. S. A. No. 055109, was attached to the rear of said two and one-half-ton truck by a standard coupling fastening. That said two and one-half-ton truck and said generator trailer were each equipped

with electrical brake connections but that the voltage and size of the connections were different and could not be attached together. That the electrical equipment on the two and one-half-ton truck was 12 volt and that the electrical equipment on the generator trailer was 6 volt. That in order to connect the two, it was necessary to use a conversion kit which had not been made available to the National Guard by the Department of the Army.

12. That at about 11:45 a.m. on March 11, 1953, Brown was returning to said Battery C, driving said truck and pulling said trailer in a northerly direction on U. S. 99, approaching the south city limits of Tacoma, Washington. That as Brown approached the point of impact with plaintiffs' vehicle, he applied his brakes and the trailer pushed the rear end of the truck to the east so that the front end of the truck swung to the west and crossed into the southbound traffic lanes of U. S. 99, striking the left side of the southbound plaintiff's vehicle.

13. That at and prior to the time of said collision, the M 7 generator trailer, U. S. A. No. 055109, weighed 8,100 pounds and was not equipped with any brakes that could be applied by the driver of the towing truck from its cab.

14. That Section 26 (3), Ordinance No. 11701 of the traffic code of the City of Tacoma, Washington, on March 11, 1953, provided:

“Every trailer or semi-trailer of a gross weight, including load, of 2,000 pounds or more, when operated upon the public highways of the

City of Tacoma, shall be equipped with brakes adequate to control the movement of and to stop and to hold such vehicle and so designed as to be applied by the driver of the towing motor vehicle from its cab.”

15. That the Revised Code of Washington, Section 46.36.020, Laws of 1937, Chapter 189, Paragraph 34, in effect on March 11, 1953, provides in part:

“Every trailer or semi-trailer of a gross weight, including load, of 2,000 pounds or more, when operated upon a public highway, shall be equipped with brakes adequate to hold the movement of and to stop and to hold such vehicle and so designed as to be applied by the driver of the towing motor vehicle from its cab.”

16. That the truck and trailer and equipment carried therein at the time of the accident was owned by the United States of America and was on loan to the National Guard for the purpose of training personnel and transporting equipment and personnel of the National Guard. That in the event of obsolescence or wearing out of said equipment, or in the event of an emergency requiring its use by the United States of America, the United States of America could demand the immediate return of said equipment from the National Guard.

17. That the following incomplete list of bills are for care and treatment to plaintiff Mar-Le Wendt that was necessitated by injuries received

by said plaintiff in the accident complained of and that the amounts thereof are reasonable. That said bills may be admitted into evidence without further proof:

(a)	J. L. Ash, M.D.....	10.00
(b)	Laurel Rae Foxworthy, M.D.....	15.00
(c)	Tacoma General Hospital.....	12.00
(d)	Homer W. Humiston.....	5.00
(e)	Frank P. Mathews, M.D.....	72.00
(f)	Clintworth Optical Dispensary....	65.56
(g)	St. Joseph's Hospital.....	84.35
(h)	W. Howard Pratt, M.D.....	40.00
(i)	A. E. Morrison, M.D.....	15.00
(j)	Arthur M. Torrie, M.D.....	50.00

18. That at the time and place of said collision, defendant Pacific Telephone and Telegraph Company's employees were rodding underground conduit through a manhole in a portion of the north-bound traffic lanes of U. S. 99 some distance north of the point of impact. That three of said defendant's trucks were in said street. That said defendant had placed certain warning devices in said street some time prior to said collision.

19. That as a direct and proximate result of the collision between the military truck and plaintiff's vehicle, plaintiff Mar-Le Wendt sustained physical injuries, physical and mental pain, disability, and incurred medical expenses and other losses.

20. That as a direct and proximate result of said collision, plaintiff Albert D. Rosellini's 1950 Nash

sedan automobile was damaged in the sum of \$1,392.93.

21. That at all times herein mentioned the 770th AAA Battalion, Washington National Guard, including Battery C thereof, was Federally recognized and not in the Active Federal Military Services.

Plaintiffs' Contentions

1. That Brown was negligent in operating said truck and trailer without brake connections between them.

2. That Brown was negligent in failing to maintain a proper or any lookout for other users of the highway and in particular the warning devices placed in the highway by defendant Pacific Telephone and Telegraph Company.

3. That Brown was negligent in operating said truck and trailer at a rate of speed greater than was reasonable and proper under the conditions existing at the point of operation.

4. That Brown was the agent, servant and employee of defendant United States of America, acting within the scope and course of his employment at the time of the accident.

5. That even if Brown was not the agent, servant and employee of defendant United States of America acting within the scope and course of his employment, defendant United States of America was negligent in furnishing to and permitting the operation by the National Guard, on the public highways of the State of Washington, of the truck

and trailer without brake connections between them.

6. That defendant Pacific Telephone and Telegraph Company was negligent in failing to erect and maintain sufficient and adequate warnings, signs and signals a sufficient distance south of the point of their operations.

7. That each of the acts of negligence alleged hereinabove were direct and proximate causes of plaintiff's injury and damage.

8. That as to defendant United States of America, this action arises under the Act of June 25, 1948, 62 Stat. 933, 937; U.S.C. Title 28, Sections 1346 (b), 1402 (b).

9. That plaintiff Mar-Le Wendt has been damaged in the sum of \$200,000.00, as the result of severe and permanent physical injuries, physical and mental pain, expenditures for medical treatment and other losses.

10. That each of the acts of negligence alleged were in violation of the Statutes of the State of Washington and Ordinances of the City of Tacoma.

Contentions of Defendant
United States of America

1. That Sergeant Brown, acting in his capacity as Unit Caretaker of Battery C, 770th AAA Battalion, Washington National Guard, was a civilian employee of the State of Washington, appointed to and serving in his position pursuant to the laws and regulations of the State of Washington; and that at all times and in connection with all his

activities mentioned herein, he was subject to the sole direction and control of the State of Washington; and that in no way did he act as agent, servant or other employee of or under the direction or control of the United States.

2. That even though William L. Brown acted in compliance with standards and regulations promulgated and provided by the United States, such standards and regulations had been adopted by the State of Washington and made a part of the Guard regulations of said State. Such regulations having once been adopted by the State become effective and are enforced solely under the authority and sovereign power of the State of Washington; the United States having obtained by such adoption no power or authority to direct or control their enforcement with respect to personnel or employees of the state guard.

3. That the issuance of military property belonging to or loaned to the State of Washington by the United States is prohibited by the laws of the State of Washington to other than persons or organizations belonging to the State Militia and for purposes other than the requirements of that service. RCW-Title 38, Sec. 38.12.020, pars. (8) and (9).

4. That if the plaintiffs, or either of them, sustained any injuries or damages because of said accident, the same were not caused by reason of any act, omission or negligence on the part of defendant United States of America or on the part of William L. Brown, the driver of the National Guard truck, but were directly and proximately

caused and due to the negligent acts and omissions of defendant Pacific Telephone & Telegraph Company, its agent, servants and employees in failing to erect and maintain proper, sufficient and adequate warnings, signs and signals, under the circumstances and conditions then and there existing, a sufficient distance south of the point of their operations upon and under the public thoroughfare and in the right of way of the National Guard truck and other vehicles lawfully proceeding northward on said highway.

Contentions of Defendant

Pacific Telephone and Telegraph Company

1. That adequate signs, signals and warnings were placed a sufficient distance south of the point of repairs to warn oncoming traffic of the existence of said repairs, and to allow northbound traffic a sufficient time to slow down and to change lines of traffic.

2. That even if said defendant had placed no signs or warning devices in or near said highway, U. S. 99, said defendant's telephone truck standing in the east traffic lane of said highway was plainly visible to drivers of northbound vehicles, including said Brown, and in itself constituted sufficient notice of its presence.

3. That even if defendant Pacific Telephone and Telegraph Company was negligent, such negligence was not a proximate cause of plaintiffs' damage.

Issues of Fact and Law

That the issues of Fact and Law are set forth in the respective contentions of the parties, as stated in "Contentions."

Exhibits

The following exhibits were produced and identified and may be received in evidence pursuant to stipulation herein without further authentication or proof, it being admitted that each is what it purports to be:

Plaintiffs' Exhibits:

1. Photograph of truck and trailer.
2. Photograph of truck and trailer.
3. Photograph of plaintiff automobile.
4. Photograph of plaintiff automobile.
5. Photograph of plaintiff automobile.
6. Photograph of plaintiff automobile.
7. Certified true copy of State of Washington Department of Licenses certificate of weight of defendant United States of America truck and trailer.
8. Photostatic copy of army shipping document for two and one-half-ton truck.
9. Photostatic copy of army shipping document for quarter-ton truck.
10. Photostatic copy of War Department shipping document for M 7 generator trailer.
11. Photostatic copy of army shipping document for director.
12. Photostatic copy of issue slip for two and one-half-ton truck with equipment.

13. Photostatic copy of issue slip for quarter-ton truck.

14. Photostatic copy of issue slip for director.

15. Photostatic copy (13) sheets of special orders.

16. Mimeographed copy of Revised Field Civilian Personnel Program—Project 1213, dated 22 December, 1952, consisting of 17 pages.

Defendant United States of America's Exhibits:

1. Photostatic copy (9 sheets) of insurance documents and related correspondence.

That as to Defendant United States of America's Exhibits marked for identification as 2 through 6, inclusive, it is stipulated that they are what they purport to be and as to the portions admissible, if any, may be admitted without further proof, to wit:

2. Certified copy of Army Regulations, Special Regulations, War Department Circular No. 34, and a General Order, on file in the office of the Adjutant General, Department of the Army, Washington 25, D. C.

3. Certified copy NGR, official publications of the Department of the Army, now in custody, National Guard Bureau, Department of the Army.

4. Certified copy NGR Circulars, now on file, N. G. Bureau.

5. Cert. Copy, Annual Report, Chief, National Guard Bureau, on file, N. G. Bureau, ending June, 1949.

6. Certified Copy, Annual Report, Chief, Na-

tional Guard Bureau, on file, N. G. Bureau, ending 30 June, 1951.

Conclusions

The foregoing Pre-trial Order has been approved by the parties hereto as evidenced by the signatures of their counsel hereon, and the order is hereby entered as the result of which all pleadings pass out of the case, and this Pre-trial Order shall not be amended except by agreement of the parties or upon order of the Court.

Done in Open Court this 8th day of April, 1955.

/s/ GEO. H. BOLDT,
District Judge.

Approved:

/s/ M. E. CASEY,
Of Attorneys for Plaintiffs.

/s/ GUY A. B. DOVELL,
Assistant United States Attorney, for Defendant
United States of America.

/s/ DONALD D. MacLEAN,
Of Attorneys for Defendant Pacific Telephone and
Telegraph Company.

[Endorsed]: Filed April 8, 1955.

[Title of District Court and Cause.]

Nos. 1747 and 1758

COURT'S ORAL OPINION

[Designated Portion]

April 14, 1955

* * *

Now we come down to the matter of concluding the liability phase of it and I will just simply say this, that I recognize that there is very serious substance to the argument that Mr. Dovell makes, far from frivolous, but I am inclined on the whole to go along with what has been held in the Tenth and Fifth Circuits notwithstanding the fact that it may be that those two cases, that the Courts in those two cases acted without jurisdiction. Certainly they did act without jurisdiction if the unit caretaker was not an employee and acting within the scope of his employment because that is made a condition of federal jurisdiction. And it is a little hard for me to assume that two so exalted Courts, such exalted Courts as the Tenth and Fifth Circuits would have made that egregious error so I am going to find and hold that the caretaker was within the course and scope of his employment and I am further going to find and hold that it was negligence on the part of the officer in charge of this property in releasing it onto the highway knowing it was going to be driven on the highway without brakes in violation of state law.

* * *

[Endorsed]: Filed May 27, 1955.

[Title of District Court and Cause.]

Nos. 1747 and 1758

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter coming on for trial before the undersigned Judge of the above-entitled court, sitting without a jury, on the 11th day of April, 1955, plaintiffs being represented by their attorneys, Casey & Pruzan, Merwin E. Casey of counsel; Defendant United States of America being represented by Charles P. Moriarty, United States Attorney, Guy A. B. Dovell, Assistant United States Attorney; Defendant Pacific Telephone & Telegraph Company being represented by McMicken, Rupp & Schweppe, John Rupp and Donald MacLean of counsel, witnesses having been sworn and testified and evidence and exhibits having been introduced, and the court being fully advised, the court now makes the following:

Findings of Fact

I.

That at all times herein mentioned plaintiff Mar-Le Wendt was a married woman living separate and apart from her husband, and was a citizen of the State of Washington and of the United States, residing within the above-described judicial district; that all acts and omissions to act herein complained of took place in the above judicial district.

II.

That at all times herein mentioned plaintiff Albert D. Rosellini was a citizen of the State of Washington and of the United States, residing within the above-described judicial district, and was at all times herein mentioned the owner of a certain 1950 Nash sedan automobile. That all acts and omissions to act complained of took place in the above-described judicial district.

III.

That defendant Pacific Telephone and Telegraph Company is a corporation duly organized and existing under and by virtue of the laws of the State of California, authorized to transact business and transacting business in the State of Washington and in the above-described Judicial District. That the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

IV.

That at all times herein mentioned there was in force that Traffic Code of the City of Tacoma, Washington, Ordinance No. 11701, entitled:

“An ordinance regulating travel and traffic on the streets of the City of Tacoma; providing a penalty for the violation thereof; repealing ordinances 10598, 11054, 11385, and 11617, and all ordinances and parts of ordinances in conflict herewith, and declaring that this ordinance shall take effect immediately after publication.”

which was signed by the Mayor of Tacoma on June 14, 1939, and became effective on June 26, 1939. Said Traffic Code is contained in a pamphlet designated, "Tacoma Traffic Code, Ordinance 11701, as amended to June 16, 1952."

V.

That at all times herein mentioned there was in force an Ordinance of the City of Tacoma, Washington, Ordinance No. 12947, entitled:

"An Ordinance relating to and regulating the obstruction of streets, alleys and public places of the City of Tacoma, providing penalties for the violation thereof and repealing Ordinances Nos. 2239, 3257, and 9895."

signed by the Mayor of Tacoma on October 9, 1946, and became effective October 21, 1946, which Ordinance was amended by Ordinance No. 14124, passed by the City Council of Tacoma on March 14, 1951, published March 15, 1951.

VI.

That plaintiff Mar-Le Wendt was the driver and sole occupant of said Nash automobile.

VII.

That on March 11, 1953, William L. Brown, Serial No. 28994242, was a sergeant in Battery C, 770th AAA Battalion, State of Washington National Guard, stationed at Seattle, Washington. That he was paid therefor \$6.18 per drill, on a quarterly basis, by check issued by the United States Army Finance Center, Seattle. That on said date, Brown was also a full-time civilian "Ad-

ministrative, Supply and Maintenance Technician" in Battery C, 770th AAA Battalion, having been so appointed by Par. 2, Special Order 286, Headquarters Military Department, State of Washington, Office of the Adjutant General, dated October 12, 1952, effective October 16, 1952. That he was paid therefor \$3,695.70 annually, on a monthly basis, by check issued by the United States Army Finance Center, Seattle, from funds separate from those received as a member of the National Guard. That the primary duties of Brown as Administrative, Supply and Maintenance Technician included receipting for and taking delivery of material and equipment at Camp Murray, Washington, and returning it to the 770th AAA Battalion in Seattle, Washington.

VIII.

That all acts referred to as having been done by William L. Brown were done by him under the authority of and strictly in accordance with Paragraph 3, Special Order 67, Headquarters Military Department, State of Washington, Office of the Adjutant General, Camp Murray, Washington. That said Special Order was directed to said Brown as Unit Materiel Caretaker in said Battery C.

IX.

That by virtue of Departments of the Army and the Air Force National Guard Bureau, Washington 25, D. C., NG-ARPC 231 General, dated December 22, 1952, subject: Revised Field Civilian Personnel Program, Project 1213, directed to the Adjutants General of all States, Alaska, Hawaii,

Puerto Rico and the District of Columbia, the title of "Unit Materiel Caretaker" or "Unit Caretaker" was changed to "Administrative, Supply and Maintenance Technician," and qualifications and job specifications were set forth. That said publication was in full force and effect on March 11, 1953.

X.

That on March 11, 1953, Brown drove a National Guard vehicle to Camp Murray for the purpose of transporting vehicles and supplies from Camp Murray to Battery C in Seattle.

XI.

That upon arrival at Camp Murray on March 11, 1953, Brown took delivery of and receipted for one truck, cargo, two and one-half ton, 6 x 6, M 211, U. S. A. No. 41188153, with equipment, and prepared to return to said Battery C in Seattle, Washington. That at the same time and place, one Stanley DeArment, Administrative, Supply and Maintenance Technician for Battery B, 770th AAA Gun Battalion, Washington National Guard, stationed at Seattle, Washington, took delivery of one M 9A2 Director, mounted on an M 7 generator trailer U. S. A. No. 055109, and one quarter-ton 4 x 4 utility M 3 8A1 truck, U. S. A. No. 20961521. That said quarter-ton truck was loaded into the rear of the said two and one-half-ton truck and that the said M 7 generator trailer, U. S. A. No. 055109, was attached to the rear of said two and one-half-ton truck by a standard coupling fastening. That said two and one-half-ton truck and said generator

trailer were each equipped with electrical brake connections but that the voltage and size of the connections were different and could not be attached together. That the electrical equipment on the two and one-half-ton truck was 12 volt and that the electrical equipment on the generator trailer was 6 volt. That in order to connect the two, it was necessary to use a conversion kit which had not been made available to the National Guard by the Department of the Army.

XII.

That at about 11:45 a.m. on March 11, 1953, Brown was returning to said Battery C, driving said truck and pulling said trailer in a northerly direction on U. S. 99, approaching the south city limits of Tacoma, Washington. That as Brown approached the point of impact with plaintiffs' vehicle, he applied his brakes and the trailer pushed the rear end of the truck to the east so that the front end of the truck swung to the west and crossed into the southbound traffic lanes of U. S. 99, striking the left side of the southbound plaintiff's vehicle. That the pavement was wet and slippery and that the truck was proceeding at over 20 miles per hour.

XIII.

That at and prior to the time of said collision, the M 7 generator trailer, U. S. A. No. 055109, weighed 8,100 pounds and was not equipped with any brakes that could be applied by the driver of the towing truck from its cab.

XIV.

That section 26 (3), Ordinance No. 11701 of the traffic code of the City of Tacoma, Washington, on March 11, 1953, provided:

“Every trailer or semi-trailer of a gross weight, including load, of 2,000 pounds or more, when operated upon the public highways of the City of Tacoma, shall be equipped with brakes adequate to control the movement of and to stop and to hold such vehicle and so designed as to be applied by the driver of the towing motor vehicle from its cab.”

XV.

That the Revised Code of Washington, Section 46.36.020, Laws of 1937, Chapter 189, Paragraph 34, in effect on March 11, 1953, provides in part:

“Every trailer or semi-trailer of a gross weight, including load, of 2,000 pounds or more, when operated upon a public highway shall be equipped with brakes adequate to hold the movement of and to stop and to hold such vehicle and so designed as to be applied by the driver of the towing motor vehicle from its cab.”

XVI.

That the truck and trailer and equipment carried therein at the time of the accident were owned by the United States of America and were on loan to the National Guard for the purpose of training

personnel and transporting equipment and personnel of the National Guard. That in the event of obsolescence or wearing out of said equipment, or in the event of an emergency requiring its use by the United States of America, the United States of America could demand the immediate return of said equipment from the National Guard.

XVII.

That at all times herein mentioned the 770th AAA Battalion, Washington National Guard, including Battery C thereof, was Federally recognized and not in the Active Federal Military Services.

XVIII.

That at the time of the collision, defendant The Pacific Telephone and Telegraph Company had a crew of men and three trucks working on said defendant's underground facilities on South Tacoma Way inside the city limits of the City of Tacoma, Washington. The most southerly of the three trucks was located approximately 200 feet north of the south city limits of said city. The truck was parked in the northbound curb or outside lane of traffic, facing in a southerly direction, backed up to a manhole in the street. Another truck was parked in the same lane, backed up to and on the opposite side of the same manhole, facing north. The third truck was some considerable distance north of the manhole. The northbound inside traffic lane on South Tacoma Way was not obstructed and was free for the use of northbound vehicular traffic.

XIX.

Defendant The Pacific Telephone and Telegraph Company had placed in the street, and on the trucks, warning signs, flags and signals designed to warn all traffic, including northbound traffic, of the presence of said trucks. Said warning signs and signals were conspicuously placed. In particular, there were placed on the street, in the outside traffic lane, two "Men Working" signs south of the most southerly truck. One of these "Men Working" signs was placed approximately 12 feet south of this truck. The second sign was considerably south, a distance of approximately 171 feet south of the southernmost truck, and this sign and the trucks standing in the street were visible to traffic approaching from the south from a distance of several hundred feet south of this most southerly sign.

XX.

That on and prior to the day of the collision, Albert G. Hagen was a Lt. Colonel on active duty as an officer in the employment and service of the Army of the United States in the Ordnance Branch, detailed as United States Property and Fiscal Officer to the Washington National Guard at Camp Murray, Washington. That he wore the insignia of the National Guard Bureau. That he replied to Plaintiffs' subpoena by an order from the Judge Advocate General's Department of the United States Army, based on an Army Regulation, ordering him not to testify. That this order was later rescinded by the United States. That prior

to delivery of the 2½-ton truck and M7 Generator Trailer to Brown, Colonel Hagen knew that said truck would pull said loaded trailer from Camp Murray to Seattle over the public highways of the State of Washington, and that because of the different voltage systems on the truck and trailer, there were no brakes on said trailer capable of being operated from the truck cab. That Colonel Hagen nevertheless authorized and directed that said truck and trailer be issued to Brown.

XXI.

That Plaintiff Mar-Le Wendt incurred medical expenditures of the reasonable amount of \$6,404.75 for treatment of injuries incurred in the accident, which injuries consisted of the following: Multiple rib fractures on the left side; crushed chest; multiple fractures of the pelvis; multiple abrasions and contusions; cerebral concussion; sub-dural hygroma over the right side of the brain; frontal lobe brain damage. That subsequent to said accident a bi-temporal craniotomy was performed and the sub-dural spaces were drained of fluid that had formed as a result of the injuries suffered in said accident. That she has suffered permanent sub-cortical and frontal lobe brain damage and personality change, affecting the portion of the brain controlling memory, association, judgment, personality and the higher intellectual functions, and has received permanent disfiguring scars and permanent damage to the use and function of her pelvis.

XXII.

That plaintiff Albert D. Rosellini's 1950 Nash sedan automobile was damaged in the sum of \$1,392.93 as a direct and proximate result of the collision.

From the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

I.

That Sergeant William L. Brown was at all times the agent, servant and employee of defendant United States of America, acting within the scope of his office and employment as an Administrative, Supply and Maintenance Technician.

II.

That Sergeant William L. Brown did not exercise due care and was negligent in the following particulars: In operating the truck and trailer on the public highway of the State of Washington without brake connections to said trailer that could be applied from the cab of the towing truck; in operating said truck and trailer at a rate of speed greater than was reasonable and proper under the conditions existing at the point of operation; in failing to maintain a proper or any lookout for and in failing to timely see the warning devices placed in the highway by defendant The Pacific Telephone and Telegraph Company.

III.

That Lt. Colonel Albert G. Hagen was at all times the agent, servant and employee of defendant United States of America, acting within the scope of his office and employment as United States Property and Fiscal Officer in authorizing the issuance to Sergeant William L. Brown of the truck and trailer.

IV.

That Lt. Colonel Albert G. Hagen did not exercise due care and was negligent in authorizing the issuance to Sergeant William L. Brown of the truck and trailer, knowing that said truck and trailer would be operated on the public highway of the State of Washington and knowing that the operation of said truck and trailer together on the public highway of the State of Washington was illegal.

V.

That the aforesaid acts of negligence of Sergeant Brown and Lt. Colonel Hagen were the direct, proximate causes of the collision and the injuries and damages sustained by Plaintiffs. That neither plaintiff was guilty of contributory negligence.

VI.

That as to defendant United States of America this action arises and this court has jurisdiction under the Act of June 25, 1948, 62 Stat. 933, 937; U.S.C. Title 28, Sections 1346 (b) and 1402 (b).

VII.

That Defendant United States of America, if a private party, would be liable to Plaintiffs in accordance with the laws of the State of Washington and ordinances of the City of Tacoma.

VIII.

That defendant The Pacific Telephone and Telegraph Company was a public utility and a public service company and had an important duty to render efficient telephone and telegraph service to its subscribers and the general public, and to maintain its facilities in efficient working condition. That said defendant had a duty in maintaining its facilities to use reasonable and ordinary care to see that any obstruction of the public highway necessitated by such maintenance did not create a hazard to the users of such public highway.

IX.

That precautions taken by defendant The Pacific Telephone and Telegraph Company fulfilled the duty of ordinary and reasonable care and said defendant was not guilty of any negligence. The acts and conduct of said defendant were a mere condition and not a cause of said collision.

X.

That judgment should be awarded against defendant United States of America in favor of plaintiff Mar-Le Wendt in the sum of \$56,404.75, and in favor of plaintiff Albert D. Rosellini in the sum of \$1,392.93, together with their statutory costs.

Done in Open Court this 7th day of December,
1955.

/s/ GEO. H. BOLDT,
District Judge.

Presented by:

/s/ M. E. CASEY,
Of Attorneys for Plaintiffs.

Approved for entry and Notice of Presentation
Waived:

/s/ JOHN N. RUPP,
Of Attorneys for Defendant The Pacific Telephone
& Telegraph Company.

Copy Received:

/s/ GUY A. B. DOVELL,
For Defendant United States
of America.

[Endorsed]: Lodged Nov. 10, 1955.

[Endorsed]: Filed Nov. 7, 1955.

United States District Court, Western District
of Washington, Southern Division

Nos. 1747 and 1758

MAR-LE WENDT and ALBERT D. ROSEL-
LINI,

Plaintiffs,

vs.

PACIFIC TELEPHONE & TELEGRAPH
COMPANY, a Corporation,

Defendant,

and

MAR-LE WENDT and ALBERT D. ROSEL-
LINI,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This Matter coming on for trial before under-
signed Judge of the above-entitled Court sitting
without jury on the 11th day of April, 1955, plain-
tiffs being represented by their attorneys, Casey
& Pruzan, Merwin E. Casey of counsel; defendant
United States of America being represented by
Charles P. Moriarty, United States Attorney, of
counsel, defendant The Pacific Telephone and Tele-
graph Company being represented by McMicken,
Rupp & Schweppe, John Rupp and Donald Mac-

Lean of counsel, witnesses having been sworn and testified and evidence and exhibits having been introduced, and the Court having entered its Findings of Fact and Conclusions of Law, now therefore,

It Is Ordered that plaintiff Mar-Le Wendt have judgment against defendant United States of America for the sum of \$56,404.75, together with her statutory costs herein to be taxed.

It Is Further Ordered that plaintiff Albert D. Rosellini have judgment against defendant United States of America for the sum of \$1,392.33, together with his statutory costs herein to be taxed.

It Is Further Ordered that plaintiffs recover nothing against defendant The Pacific Telephone and Telegraph Company and that said defendant have and recover its costs against plaintiffs herein to be taxed.

Done in Open Court this 7th day of December, 1955.

/s/ GEO. H. BOLDT,
District Judge.

Presented by:

/s/ M. E. CASEY,
Of Attorneys for Plaintiffs.

Approved for entry and Notice of Presentation Waived:

/s/ JOHN N. RUPP,
Of Attorneys for Defendant, The Pacific Telephone & Telegraph Company.

Copy received:

/s/ GUY A. B. DOVELL,
For Defendant, United
States of America.

[Endorsed]: Lodged November 10, 1955.

[Endorsed]: Filed and entered Dec. 7, 1955.

[Title of District Court and Cause.]

Nos. 1747 and 1758

NOTICE OF APPEAL

Notice Is Hereby Given:

That the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered on December 7, 1955, in the above-entitled actions, consolidated for purposes of trial and appeal.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ GUY A. B. DOVELL,
Asst. United States Attorney.

/s/ E. E. REDMAYNE,
Deputy Clerk.

[Copies mailed February 1, 1956.]

[Endorsed]: Filed February 1, 1956.

[Title of District Court and Cause.]

Nos. 1747 and 1758

DESIGNATION OF RECORD
ON APPEAL

Defendant, having filed its notice of appeal, hereby designates the record on appeal as follows:

The entire record in the District Court, including the pleadings, motions, orders, interrogatories and answers thereto, transcript of proceedings, all exhibits, findings of fact, conclusions of law, judgment, and notice of appeal.

CHARLES P. MORIARTY,
United States Attorney,

By /s/ GUY A. B. DOVELL,
Asst. United States Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed April 16, 1956.

In the District Court of the United States for the
Western District of Washington, Southern Division

Nos. 1747 and 1758

MAR-LE WENDT and ALBERT D. ROSEL-
LINI,

Plaintiffs,

vs.

PACIFIC TELEPHONE & TELEGRAPH
COMPANY, a Corporation,

Defendant.

MAR-LE WENDT and ALBERT D. ROSEL-
LINI,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT AND TRIAL OF
PROCEEDINGS

[Designated Portions]

Before: George H. Boldt, United States District
Judge.

April 11, 1955—9:35 A.M.

LAWRENCE BROWN

being first duly sworn on oath, was called as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination

By Mr. Casey:

The Clerk: State your full name and spell your last name.

The Witness: Lawrence Brown, B-r-o-w-n.

Q. State your address, Mr. Brown.

A. 624 7th Avenue, Kirkland, Washington.

Q. By whom are you employed at the present time?

A. Battery A, 200 Washington National Guard.

Q. In what capacity are you working now?

A. Radar operator.

Q. Are you on active duty with the National Guard? A. No.

Q. Directing your attention to March 11th of 1953, on that date were you a member of the Washington National Guard? A. I was.

Q. What grade did you hold?

A. Master Sergeant.

Q. What was your serial number?

A. 28994242.

Q. On that date can you state whether the unit to [56*] which you were assigned was on active federal duty? A. It was not.

Q. Can you state whether it was a federally rec-

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Lawrence Brown.)

ognized unit? A. It was.

Q. Now as a sergeant in the Washington National Guard on that date did you go to meetings?

A. Yes, we did.

Q. How often were those meetings held and where were they held?

A. Once a week and they were held in the armory in Seattle.

Q. Now that was the 770 Field Battalion?

A. Anti-aircraft.

Q. Anti-aircraft Battalion? A. Yes.

Q. And was the armory in Seattle its assigned headquarters? A. Yes.

Q. What night of the week did you go to those meetings, if you recall?

A. I don't recall exactly, sir. It was either Tuesday or Monday.

Q. You are sure it was one of those two?

A. One of the two, I believe. [57]

Q. Now what hours did that take on Monday or Tuesday night? A. Two hours.

Q. From when to when?

A. Eight to ten.

Q. Did you wear your uniform to those meetings? A. We did.

Q. Were you required to wear uniforms to those meetings? A. We were.

Q. What pay did you receive as a sergeant in the Washington National Guard at that time?

A. It was the equivalent of one day's Army pay for equal rank.

(Testimony of Lawrence Brown.)

Q. And how often were you paid?

A. Every quarter.

Q. And where would that check come from?

A. From the Army Finance Center, Seattle.

Q. Now, on March 11th and prior to that of 1953, did you have any other employment?

A. I did.

Q. What was that?

A. I was a materiel caretaker for the National Guard.

Q. For what unit of the National Guard?

A. On March 11th it was Battery C. [58]

Q. Battery C? A. Yes, of 770th.

Q. How long had you been employed as a unit caretaker for Battery C of the 770th prior to March 11, 1953?

A. I believe since October. I am not quite sure of that.

Q. What days of the week did you work in that job?

A. Five days a week, Monday through Friday.

Q. And what were your hours of employment?

A. Eight to four-thirty.

Q. Did you do any overtime work on that job?

A. Occasionally.

Q. Were you paid for such overtime work?

A. No, we were not.

Q. How much pay did you receive as unit materiel caretaker? A. On that date?

Q. On that date.

The Court: You mean——

(Testimony of Lawrence Brown.)

Q. (Continuing): Not per day but in what manner were you paid? A. At that time?

Q. At that general time, yes.

The Court: During that period what was your rate of pay? [59]

Q. (Continuing): That is what I mean.

A. I believe it was around \$315 a month but I couldn't say for sure.

Q. Now, how often did you receive pay as materiel caretaker? A. Once a month.

Q. And where did that check come from?

A. United States Army Finance Center, Seattle.

Q. Did you know whether that check came from different funds than the quarterly check you received for being a member of the National Guard?

A. I can't say for sure.

The Court: Stipulated fact, says so.

Mr. Casey: Excuse me.

Q. Prior to your being a unit caretaker for Battery C of the 770th had you been a unit caretaker for any other units with the National Guard?

A. I had.

Q. Can you state what those units, approximately the periods of service that you were in that capacity with other units?

A. I had been a caretaker with the Clearing Co. of the 116th Medical Battalion located in Seattle.

Q. How long—what was the, approximately the first date when you became a materiel caretaker? [60]

(Testimony of Lawrence Brown.)

A. I think it was January 1st or 2nd, 1951.

Q. And were you with the Clearing Co. at that time? A. Yes.

Q. Did you know what your rate of pay was when you started out as a caretaker?

A. I believe it was around \$2,700 a year.

Q. Did you receive several promotions after that date? A. I did.

Q. Now, did you go directly from your duties as unit caretaker in this Clearing Co. to your duties as caretaker in Battery C of the 770th?

A. Yes, sir.

Q. When you were first hired as a unit caretaker in the Clearing Co. did anybody describe to you your duties in that position?

A. They did.

Q. Who was that?

A. The person by whom I was interviewed in Seattle and by the officer I was interviewed by at Camp Murray.

Q. By whom were you interviewed in Seattle?

A. By my future Company Commander and by the personnel officer.

Q. By whom were you interviewed in Camp Murray?

A. United States Property and Disbursing Officer. [61]

Q. Now the—do you recall the name of that man in 1951?

A. Col. Wilkins was the United States Property and Disbursing Officer, Col. Hagen was his

(Testimony of Lawrence Brown.)

assistant and he was the one who actually interviewed me.

Q. Col. Hagen? A. Yes.

Q. And Col. Hagen, I believe, is now the United States Property and Disbursing Officer at Camp Murray? A. He is.

Q. By the way, for the purpose of the record, what is Camp Murray?

A. That is the National Guard headquarters for the State of Washington.

Q. Now, when Col. Hagen interviewed you what was he? Was he a National Guard officer or regular Army officer?

A. At the time of the interview he was National Guard officer.

Q. What is the rank, if you know, of the United States Property and Disbursing Officer at Camp Murray?

A. I believe he holds federal recognition as a lieutenant colonel.

Q. Well, is he an officer on active duty with the United States Army?

A. I believe he is, sir. [62]

Q. Now, what did he tell you concerning your duties when you were hired in January of 1951?

A. Well, that my duties would consist mainly of care and maintenance of property and some administrative and supply work, transporting of supplies to Seattle.

Q. From where?

A. From Camp Murray, sir.

(Testimony of Lawrence Brown.)

Q. Did he tell you it was part of your duties to pick up equipment at Camp Murray being issued to your unit and take it to your unit?

A. I believe he did, sir, yes.

Q. Did your company commander in Battery C of the 770th ever assign to you any duties in addition to the duties you were originally advised you were to perform?

A. It is hard to say, sir. He might have at one time or another.

Q. Were you familiar on or prior to March, 1953, with the regulations applicable to hiring and duties of caretakers?

A. Somewhat, yes, sir.

Q. What was your understanding regarding those regulations as to whether your duties included—

Mr. Dovell: I am going to object to that, your Honor. The regulations should speak for themselves.

The Court: Yes, I think that is right, and what [63] this witness' understanding of them was wouldn't add anything to it.

Q. (Continuing): Where was the headquarters of the Clearing Co. for which you were caretaker prior to, with Battery C of 770th?

A. It was in Seattle, sir. It started at the armory, the new armory, Field Artillery Armory and later we moved to the old armory down on Western Avenue.

Q. Were your duties in Battery C substantially the same as your duties in the Clearing Co.?

(Testimony of Lawrence Brown.)

A. Yes, sir.

Q. Included—you perform the same functions?

A. Mostly yes, sir.

Q. By the way, did you, were you required to wear your uniform in the course of your duties as unit caretaker? A. No, sir.

Q. Did you from time to time as caretaker in the 770th receive written orders to go to Camp Murray and pick up equipment? A. No, sir.

Q. Do you know whether when you went to Camp Murray to pick up equipment you were proceeding under written orders?

A. I don't know, sir, no. [64]

Mr. Casey: May I have Plaintiffs' Exhibit 15, please?

Q. I will ask you whether you are familiar with Special Order No. 67 dated 8 March, 1953, from Headquarters Military Department, State of Washington, Office of the Adjutant General, paragraph 3, which states:

“Robert H. Madden. Co. Level NCO, Administrative Assistant, Headquarters and Headquarters Battery 770th Gun Battalion; James P. McBride, Eugene R. McDonald; Stanley N. DeArment and William L. Brown, Unit Materiel Caretakers, Headquarters and Headquarters Battery, Battery A, B and C of 770th Gun Battalion, respectively, Seattle, Washington, will proceed on or about 11 March, 1953, from Seattle to Camp Murray, on temporary duty for approximately one day for the purpose of transporting vehicles and supplies of the

(Testimony of Lawrence Brown.)

National Guard and upon compliance of temporary duty will return to their proper station.”

Are you familiar with that order?

A. Yes, sir. [65]

Q. Was it in accordance with that order that you went to Camp Murray on March 11th to pick up the equipment you were driving back at the time of this accident?

A. That order was not published for distribution until after the accident.

Q. But it was in accordance with that that you were proceeding?

A. Yes, sir.

Q. Well now——

Mr. Dovell: I am going to object to that. That is a conclusion because it is just so far as he has since learned. He didn't know it at the time he was acting.

The Court: Yes, in that sense.

Mr. Dovell: Conclusion now. [65-A]

The Court: It would seem to be this witness' conclusion about the matter. It doesn't add much to it anyway what the witness thinks about it one way or another as far as I can see. Go ahead.

Q. (Continuing): Well, now, I understand that you drove down to Camp Murray on the morning of March 11th with other unit caretakers of the 770th, is that correct?

A. Yes, sir.

Q. What equipment did you draw when you were there?

A. Mainly trucks and fire control equipment as I remember.

(Testimony of Lawrence Brown.)

Q. Well now, did you hook together the 2½-ton truck and trailer you brought back to Seattle with you?

A. I didn't hook them personally, no, sir.

Q. Did you know at that time the nature of the hook-up between the two vehicles?

A. Yes, sir.

Q. Did you know that there was no brake connection between the truck and the trailer?

A. Not until after it was hooked.

Q. But you did know it before you started from Camp Murray to return to Seattle?

A. Yes, I did.

Q. Now is it—I notice that the trailer—strike that. I notice that the trailer in this instance is a [66] four-wheel trailer?

A. That is correct, sir.

Q. Can that type and size of trailer be pulled by a jeep?

A. No, sir.

Q. Why is that?

A. I believe the trailer alone weighs more than the jeep, sir.

Q. What type of vehicle has to pull the type of four-wheel trailer that was involved in this case?

A. I believe the regulations say nothing less than a 2½-ton truck, sir.

Q. Had your unit—by your unit I mean the 770th—been on active duty shortly prior to this accident?

A. It had, sir.

Q. Had you been with it at that time?

A. No, sir.

(Testimony of Lawrence Brown.)

Q. When you joined the unit do you know whether it had any vehicles, any trucks?

A. I believe they had some, sir. I can't state for sure.

Q. Do you know whether there were electrical brake connections on the trailer and on the truck when you left Camp Murray?

A. I don't quite follow you, sir. [67]

Q. Well, you say that you learned about the absence of braking connection between the truck and trailer before you left Camp Murray but after the vehicles had been hooked together manually, is that right?

A. Yes.

Q. How did you learn about it; what did you do?

A. I asked if the brakes were hooked up.

Q. Who did you ask?

A. I believe it was Hart.

Q. And what did he say?

A. I was told that there was no brake connection that would work between that type of truck and that type of trailer.

Q. What did you do when you left Camp Murray and proceeded towards the point of the accident? Strike that.

As you proceeded toward Tacoma what was the condition of the weather?

A. Well, it had been raining. It was wet, cloudy out.

Q. Now, as you approached the scene of the ac-

(Testimony of Lawrence Brown.)

cident, say three, four hundred feet back from it, at about what speed were you traveling?

A. Somewhere between twenty and twenty-five.

Q. Do you know what the speed limit was at that time for the area immediately south of the Tacoma city limits? [68]

A. Thirty-five, I believe, sir.

Q. As you approached the scene of the accident in which lane of traffic were you driving?

A. The curb lane, sir.

Q. Well now, directing your attention to Plaintiffs' Exhibit 19, I wish you'd step over here for a moment if you will.

(Reporter's note. The exhibit just referred to, the map, is Exhibit 18.)

Q. Have you seen this map before?

A. No.

Q. To your right as you look at the map is north. A. (Nods head.)

The Court: Excuse me, Mr. Brown, your voice is a little soft anyway and when you turn and look at the map you see you are talking away from us. Talk real loud. That is why I don't ordinarily permit witnesses to leave the witness stand. Go ahead now, but talk real loud.

Q. To explain the map to you briefly, to your right is north. The area to which I am pointing now represents the curb lines. This is the curb line that was on your right or east side of US 99. This is the curb line that was on your left or the west side

(Testimony of Lawrence Brown.)

of 99 as you were proceeding north on US 99. This vertical line across the street at this point is the city limits. What has been [69] marked over here in these rectangles as Star Trailer Court was the court on the west side of the street at about where the accident took place. And on the east side of the street at approximately that same point is marked "service station."

Now you will notice according to the map that before you entered the city limits of Tacoma according to the markings that are on the pavement, that there is an interrupted horizontal line on the map apparently representing the dividing line between two northbound lanes and then just above that is a completely filled in line which represents a marker between two lanes.

Now with that background will you state what lane of traffic you were driving in as you approached the Tacoma city limits?

A. I believe it was the curb lane, sir.

Q. That is the lane closest to the curb assuming it to be a curb lane, a lane next to that and then a lane next to the center, is that correct?

A. I believe so, yes, sir.

Q. All right, you may——

The Court: Mr. Brown, sometimes that lane right next to the curb is called a parking lane where cars are parked, you have probably heard it being referred to as that? [70]

The Witness: Yes, sir.

(Testimony of Lawrence Brown.)

(Whereupon, the witness resumed the stand.)

The Court: You mean you were in that lane at that point, that you were right over next to the curb in the lane that would be a parking lane if parking were permitted, is that what you mean?

The Witness: I don't remember any parked cars there, your Honor. I am confused about the road now. I don't remember it being a three-lane road.

The Court: Go ahead.

Q. Did you, as you approached the city limits of Tacoma, notice any signs, flags or trucks parked in the northbound portion of the highway?

A. Well, I did, sir, but I don't know how close I was to the city limits.

Q. How close were you to the warning sign nearest you when you first noticed it?

The Court: What was the first thing you noticed of that character, let's get at it that way.

A. It was the sign itself, sir.

The Court: What sign was that?

The Witness: "Men Working" sign.

The Court: Where was that located?

The Witness: Placed in the curb line.

The Court: Out in the street? [71]

The Witness: Yes, sir.

The Court: All right now, answer Mr. Casey's question.

(Testimony of Lawrence Brown.)

Q. Where were you when you first saw that sign?

A. Oh, maybe sixty feet. I am not sure about the distance, sir.

Q. Well, would it be approximately sixty feet?

A. Something like that. I might be able to refresh my memory from the deposition.

The Court: You ought to be able to remember that now just as well as when the deposition was taken.

Q. At about what speed were you going when you first noticed that warning sign?

A. I was still approximately somewhere between twenty and twenty-five, sir.

Q. What was the condition at that moment of other traffic proceeding north on US 99? Were there any cars ahead of you, to the side of you?

A. Oh, yes, there were a lot of cars.

Q. Now, at the moment that you first saw this warning sign was there a vehicle ahead of you in the same lane of traffic that you were driving?

A. There had been, yes, sir.

Q. Was there at the moment you saw the sign?

A. No, sir. [72]

Q. When you say there had been, explain what you mean.

A. Well, the car in front of me had changed lanes and pulled into the center lane and it was then that I saw the sign.

Q. Now, if you were about sixty feet back from the warning sign when you first saw it, about how

(Testimony of Lawrence Brown.)

far back from the warning sign were you when the car immediately ahead of you changed lanes?

A. Golly, I don't know, sir.

Q. Well, approximately, Mr. Brown. Well, strike that and let me ask you this. As you were driving down there approaching the south city limits were you keeping a lookout ahead?

A. Yes, sir.

Q. State whether you saw the warning sign as soon as the car ahead of you changed lanes?

Q. At the time you saw the warning sign what

A. I believe I did, yes.

was the condition of traffic in the other northbound lanes? A. There was a car alongside of me.

Q. Now, at the time you saw the warning sign where would you say the front of this car alongside of you was with reference to the front of your truck?

A. Oh, I think the front of his car was about, near [73] the rear of the truck itself.

Q. And by truck you mean the back of the 21½-ton? A. Yes.

Q. Not the back of the trailer?

A. That is correct.

Q. Was that car next to you going slower or faster than you were?

A. He was going faster than I was.

Q. What did you do when you saw the warning sign? A. I immediately applied the brakes.

Q. Did you apply them hard or soft?

A. Soft, sir.

(Testimony of Lawrence Brown.)

Q. Tap it? A. Yes, sir.

Q. What happened then?

A. I started to slow down. I was waiting for the car alongside of me to pass me so I could change lanes.

Q. Then what happened?

A. Well, I had to apply the brakes again and it was then that the trailer whipped.

Q. Now explain just what happened when you applied the brakes the second time?

A. When I put on the brakes the second time the slack was taken up in the trailer connection and the trailer hit the back end of the truck and whipped it around [74] towards the curb.

Q. Towards the east curb? A. Yes.

Q. The right-hand curb? A. Yes, sir.

Q. That whipped the rear end of the truck towards the right-hand curb? A. Yes, sir.

Q. What did that do to the front of the truck?

A. Shoved the front of the truck to the left-hand side over across the center line.

Q. Did this all happen rather instantaneously?

A. Yes, sir.

Q. In what direction was the truck going as it was swung to the left across the center line as you say?

A. For awhile it was almost dead west, headed dead west.

Q. In other words, the truck swung sharply, it was going north and all of a sudden it was going west? A. Yes.

(Testimony of Lawrence Brown.)

Q. Were you trying to get it under control?

A. Well, we were all given driving tests.

Q. Were you trained to get it under control at the time?

A. I was trying to get it under control. [75]

Q. Was it out of control at the time?

A. Yes, sir.

Q. And did the truck cross the center line of US 99? A. It did.

Q. Do you know in what lane the front bumper of the truck was at the time of the impact with the Nash automobile?

A. I am not sure of it, sir.

Q. Could it have been the lane closest to the west curb of US 99?

A. It could have been although I didn't think it was that far, sir.

Q. At about what speed do you believe the truck was traveling at time of impact?

A. It is pretty hard to say, sir, but I think it was under twenty.

Q. Did you feel much of a concussion when the impact occurred?

A. Well, it jolted me out of the seat, yes, sir.

Q. Did you bring the truck to a stop as soon as you could? A. Yes, sir.

Q. When you brought the truck to a stop where was the front bumper of the truck with reference to the west curb line of US 99? [76]

A. You mean where was the truck located, sir?

Q. Yes.

(Testimony of Lawrence Brown.)

A. It was located in the driveway of the Motor Court.

Q. And where it stopped then was the earliest time that you could stop the truck, is that right?

A. Yes, sir.

Q. Well, was all of the truck and trailer to the west of the west curb line by that time?

A. I believe it was, sir, yes.

Q. Well, was there any space between the west curb line and the rear end of the trailer when you first brought it to a stop?

A. I believe there was, yes, sir.

Q. About how much space do you think?

A. I wouldn't know, sir.

Q. Could it have been as much as twenty feet?

A. I wouldn't think that far, sir.

The Court: Do you mean now that the whole of the truck and trailer were completely out of the paved portion of 99, is that what you mean?

The Witness: Completely off the street, yes, sir.

The Court: Completely out of the paved portion of the highway beyond the west curb line? [77]

The Witness: Yes, sir.

Q. Handing you what has been marked Plaintiffs' Exhibit Number 1, I will ask you if that is the position that the truck and trailer first came to rest after the accident?

A. It appears to be; yes, sir.

The Court: That would be west of the sidewalk on the west sidewalk of South Tacoma Way, is that right?

(Testimony of Lawrence Brown.)

The Witness: Yes, sir.

Q. Where was the Nash automobile when you got out of the truck?

A. The Nash was sitting across the sidewalk south of the truck heading back north.

Q. Well, about how far was the Nash automobile south of the truck, how much distance would you say there was between them?

A. Oh, I suppose maybe fifty, sixty feet, sir, I don't know.

Q. You say the Nash automobile was on the sidewalk?

A. I believe it was across the sidewalk, sir, it was clear.

Q. To the west of the sidewalk?

A. Yes, west of the sidewalk.

Q. About as far west of the sidewalk as your truck was? [78]

A. Possibly.

Q. What did you do when you got out of the truck?

A. I immediately ran up to the Nash.

Q. State what you saw and did then?

A. By the time I got there there was a patrol wagon there, Tacoma Police, and also a State Patrolman, and they got the door open. I couldn't get the door on the driver's side open. They got the door on the passenger side, the front door, open.

Q. Did you try to get the driver's door open?

A. Yes, sir.

Q. Could you see somebody in there?

A. Yes, sir.

Q. Mrs. Wendt?

A. Yes.

(Testimony of Lawrence Brown.)

Q. Where was she in the car?

A. She was laying across the front seat, sir.

Q. You say the State Patrol and others got the other door open?

A. Yes, sir, the Tacoma Police did, sir.

Q. What was her condition as far as you could observe?

A. It was hard to tell, sir. She was unconscious.

Q. What did you see done with her?

A. She was placed on a stretcher and taken immediately [79] to the hospital.

Q. Mr. Brown, as you perform your duties of caretaker in Battery C are there any United States Army personnel on duty at the National Guard who supervise your activities?

A. There are United States Army personnel on duty in the armory but as far as supervising I wouldn't say they did that, sir.

Q. Well, are they advisory personnel to the National Guard units?

A. They are, sir.

Q. They are not National Guard officers, are they?

A. No, sir.

Q. Do you have occasion during the course of your duties to come in contact with them?

A. Yes, sir.

Q. Quite often?

A. At that time almost every day.

Q. In March of 1953?

A. Yes, sir.

Q. Were they familiar with what you were doing with your time?

A. Yes, sir.

Q. Do you know of your own knowledge that

(Testimony of Lawrence Brown.)

they knew that you went down to Camp Murray to pick up equipment for the unit? [80]

A. They knew it, yes, sir.

Q. Did they ever object to you, to the fact that you went down to Camp Murray to pick up the equipment? A. No, sir.

Q. To your knowledge did they ever object to anybody? A. No, sir, not to my knowledge.

Q. The day that you picked up the truck, this equipment you were taking back to Seattle, did you see Col. Hagen? A. No, sir.

Q. Did you see any other regular army military personnel there at Camp Murray?

A. Not to my recollection, no, sir.

Q. Mr. Brown, prior to January of 1953, were your duties in Battery C any different from what they were after January of 1953?

A. My particular duties were not, sir.

Q. Were you the only civilian employee in Battery C? A. I was, sir.

Q. Were there other civilian personnel employed similar to you in batteries—what do you have, headquarters and headquarter battery and then A, B and D?

A. There are four firing batteries A, B, C and D, sir.

Q. Did each of those firing batteries have a unit [81] materiel caretaker?

A. They did, sir.

Q. Did you receive any change in pay after January of 1953 by virtue of your title being

(Testimony of Lawrence Brown.)

changed from unit materiel caretaker to administrative, supply and maintenance technician?

A. I did, sir.

Q. What was that increase, if you know?

A. I think around \$300 a year, sir.

Q. That you were increased? A. Yes, sir.

Q. Was that because of your change in duties?

A. Yes, sir.

Q. And did you still continue to be paid on a monthly basis for your duties as administrative, supply and maintenance technician?

A. Yes, sir.

Q. The check came from the same place?

A. Yes, sir.

Q. And the increase was all reflected in the same monthly check that you got? A. Yes.

Q. Did you know the reason for the increase?

A. Well, I had put in my year in the particular step, grade, that I was in and that was part of the raise. [82] What it was for the other part I don't know, sir.

Q. Were you at, about the spring of 1953, were you getting rid of the old 2½-ton trucks in the National Guard?

A. I believe it was around that time we were, yes, sir.

Q. You have driven 2½-ton trucks before in the National Guard, haven't you? A. Yes, sir.

Q. You had driven them with trailers, hadn't you? A. Yes.

(Testimony of Lawrence Brown.)

Q. Had you driven the new 2½-ton trucks before? A. Yes, sir.

Q. When you were driving the old 2½-ton trucks with trailers did you hook together the brake connections? A. We did, sir.

Q. How did you do it?

A. By means of an electrical cable.

Q. Just manually? Since I have never seen one, tell me what you did and how you fastened it and so forth.

A. There is a receptacle on the back of the truck and front of the trailer, sir, with a rubber sheet cable that ran from the truck to the cable, plug it in both ends.

Q. And the one had holes in it and the other like a regular electrical connection, you put the prongs into [83] the holes?

A. They weren't exactly on the same order but accomplished the same purpose.

Q. And then you'd clamp it together?

A. No, sir, they weren't clamped.

Q. Well, did the trailer on the date of this accident that you were hauling have such a receptacle?

A. It did, sir.

Q. Did the truck have such a receptacle?

A. It had a receptacle, yes, sir.

Q. But they wouldn't fit together?

A. Right, sir.

Q. Well, in driving—I don't know whether I asked you this or not. Had you driven one of the new 2½-tons with the trailer before?

A. No, sir.

(Testimony of Lawrence Brown.)

Q. Was it your practice in driving the old 2½-ton with the trailer to always hook the electrical brake receptacles together? A. It was, sir.

Q. Were those your orders? A. Yes, sir.

Q. Was it safe to drive them if they weren't hooked together? A. Hard to say, sir. [84]

Q. It wasn't safe in this accident, was it?

A. No, sir.

Q. That is what caused the accident, wasn't it?

A. Yes, sir.

Q. What was your answer? A. Yes, sir.

The Court: Did you know that when you left Camp Murray or did you find that out in the accident, Mr. Brown?

The Witness: Sir?

The Court: Did you know that last thing that you said when you left Camp Murray that day, or did you find it out as a result of this accident?

The Witness: I was afraid of it when I left, sir.

Q. Are you familiar with what is known as a conversion unit for brakes? A. Yes, sir.

Q. What is it?

A. Well, it is a unit that can be adapted to the new truck so you can use the old trailers with the brakes. It consist of a lever in the cab of the truck which can be pulled and set the brakes on the trailer, sir.

Q. Was this new truck equipped with such a conversion unit? [85] A. No, sir.

Q. Does your unit have any conversion units, did your unit of the National Guard have any conver-

(Testimony of Lawrence Brown.)

sion units to permit the connecting of old trailers and new trucks?

A. I don't believe so, sir.

Q. Did the National Guard at Camp Murray to your knowledge have any such conversion units?

A. I wouldn't know, sir.

Q. Were you a caretaker in any National Guard unit in the, during the spring, summer and fall of 1952?

A. Yes, sir.

Q. At that time do you recall seeing or receiving orders to turn in old 2½-ton trucks?

A. I don't recall right now, sir.

Q. Do you recall receiving an order to turn in the conversion units?

A. No, sir.

Q. Do you know whether there was such an order?

A. No, sir.

Q. Well, when you first saw the Telephone Company warning flag do you believe you could have brought your truck to a stop without changing lanes?

A. I don't think so, sir.

Q. By the way, as you whipped across that highway, part of your truck hit the warning sign, didn't it? [86]

A. I believe the trailer did, sir.

Q. When you first saw the warning sign could you see all of it?

A. Yes, sir.

The Court: Where was that warning sign sitting? I don't think you have ever told us where it was in relation to anything you know. For example, can you tell us where it was with relation to the

(Testimony of Lawrence Brown.)

city limits' line; is there any physical marker of the city limits there?

The Witness: The only thing I can remember, sir, is the fire hydrant.

The Court: Where was it with relation to the fire hydrant?

The Witness: I believe it was north of the fire hydrant, sir.

The Court: North of the fire hydrant?

The Witness: Yes.

The Court: And in the street?

The Witness: Yes.

The Court: All right.

Q. I believe you testified in the same line of travel that you were proceeding?

A. Yes, sir.

Q. Was the warning sign over the crest of the hill [87] the other side of the crest?

Mr. Rupp: I will object to that on the ground it is leading, if your Honor please.

Q. (Continuing): Where was the warning sign with reference to the crest of the hill?

A. I believe it was over the crest of the hill, sir.

Q. By that, do you mean on the far side from you? A. Yes, sir.

The Court: North?

The Witness: Yes.

Q. North.

Mr. Casey: I have no other questions.

The Court: Mr. Dovell?

(Testimony of Lawrence Brown.)

Cross-Examination

By Mr. Dovell:

Q. What signs did you see, Mr. Brown?

A. The usual yellow metal "Men Working" sign.

Q. Did you see any other?

A. I believe there was another one ahead, north of that sign. I am not positive about that.

Q. In your capacity as a caretaker do you act on your own initiative or by what reason do you act?

A. I'd say a little on your own initiative and on [88] orders.

Q. Well, when you transport vehicles, trucks and trailers, do you go after those on your own initiative?

A. Well, we are told to go get them, sir.

Q. Who tells you?

A. Well, as a rule the orders would come out in the form of an issue slip or an order stating that, letter stating that your vehicles were ready for pick up from Camp Murray, sir.

Q. Are you required to obey those orders?

A. I would say yes, sir.

Q. And have you any room to exercise your own discretion in those orders? A. No, sir.

Q. You have to obey those orders?

A. I would say yes, sir.

Q. Is that the reason why you proceeded with

(Testimony of Lawrence Brown.)

the truck and trailer? A. Yes, sir.

Q. Without proper coupling?

A. Yes, sir.

Mr. Dovell: I think that is all.

The Court: Did you get any oral directions on this particular day of March 11th or the day before about going for this truck and trailer? [89]

The Witness: I think we knew probably three or four days before, sir, that we were going that day to pick up vehicles and equipment.

The Court: Who told you about that?

The Witness: Well, it would have been the Battalion Administrative Officer, sir.

The Court: That is of the National Guard Battalion?

The Witness: Of the 770th, Gun Battalion, yes, sir.

The Court: Who was that at that time?

The Witness: Capt. Nelson.

The Court: You got your instructions in the first instance orally from Capt. Nelson, is that right?

The Witness: Yes.

The Court: About three or four days in advance?

The Witness: Yes, sir.

The Court: That is all you knew about it then until after the accident happened, as far as orders were concerned, is that right?

The Witness: Yes, sir.

The Court: At some later time your attention

(Testimony of Lawrence Brown.)

has been called to the fact that apparently some order was cut at some time or other about it but you didn't know that on the day you went to get the truck or trailer?

The Witness: No, sir. [90]

The Court: This sign that was in the street was a standard, on a metal standard, the "Men Working" sign that we commonly see?

The Witness: Yes, sir; yes, sir, it is a standard thing.

The Court: It is on a steel or metal standard and it stands upright vertically and has this sign?

The Witness: Yes, sir.

The Court: You say you saw some other sign further north ahead of that?

The Witness: I believe I did, yes.

The Court: But what that said or what was on it, wording, you don't know?

The Witness: Well, I believe it was another "Men Working" sign.

The Court: Another one of these "Men Working"? Now at the same time did you see the vehicles of the Telephone Company?

The Witness: Yes, sir.

The Court: Still saw them further north?

The Witness: Yes, sir.

The Court: From where the signs were?

The Witness: Yes, sir.

The Court: No obstruction to visibility there at that time? [91]

The Witness: No, sir.

(Testimony of Lawrence Brown.)

The Court: No fog or smoke or obstructions or anything like that in the street to prevent your seeing them?

The Witness: No, sir.

The Court: The only thing that restricted you in seeing this one sign was the vehicle that was in the lane ahead of you?

The Witness: Yes, sir.

The Court: When it turned to the left you immediately saw these signs and the Telephone Company trucks on beyond that, is that right?

The Witness: Yes, sir.

The Court: Do you have something further?

Mr. Rupp: Along that same line, if your Honor please.

Cross-Examination

By Mr. Rupp:

Q. You didn't—how soon, Mr. Brown, did you see the Telephone Company truck, if you know, laying that matter of signs aside for the moment?

A. Well, I don't know. I think I saw it probably almost immediately when I saw the sign.

Q. But you didn't see it before, is that [92] right? A. No, sir.

Q. You were looking down the highway, were you not, when you were driving? A. Yes, sir.

Q. You didn't see it? A. No, sir.

Q. How big a truck was it, do you remember?

A. The Telephone Company truck?

Q. Yes. A. I don't recall, sir.

(Testimony of Lawrence Brown.)

Q. Which way was it facing, do you remember that? A. I believe it was facing north.

Q. It is your recollection it was facing north?

A. Yes, sir, I believe it was backed up.

Mr. Casey: I will object to the form of the question, your Honor, until it is indicated whether his recollection is based on what he saw as he approached the scene of the accident or what he noticed after the accident was all over.

The Court: It wouldn't make any difference what his recollection was, and that is cross-examination of this witness of course, so I have got to allow some latitude in any case. Overruled, go ahead.

Q. How high are you sitting from the pavement, if you know, when you are driving this army 21½ ton truck? [93] I am using the present tense. You used the past tense. How high were you sitting from the pavement?

A. I don't know the exact height, sir.

Q. I take it it is a fair statement, isn't it, that you are not a very good judge of distances expressed in terms of feet?

A. That is right, sir.

Q. But when you approach that truck to get into the cab you must have some idea, Mr. Brown, or must have some recollection at this time as to about how high the seat of the cab is with relation to your own height at any rate, haven't you?

A. Oh I think probably about shoulder high maybe.

(Testimony of Lawrence Brown.)

Q. How tall are you if you know?

A. About five ten, or eleven. I am not sure.

Q. And you are of normal construction I think so that, that is, you are not excessively longwaisted or shortwaisted, is that right? A. No.

Q. That would put your eye level then about eight feet above the pavement, doesn't it, by process of arithmetic? A. I imagine.

Q. Roughly that? I am not trying to pin you down to accurate statement but that is approximately what it would be? [94] At any rate you are considerably higher off the pavement, are you not, than anyone driving an ordinary passenger car coming down the road? A. Yes, sir.

Q. And consequently have better visibility ahead of you, haven't you? Can you see over the heads of most automobiles, over the tops of most cars that are ahead of you?

Mr. Dovell: I object to that form of question. That would depend upon how close you were to the vehicle in front of you.

The Court: I am aware of all of those things but the objection is overruled. Keep in mind this is cross-examination. Go ahead.

A. Well, as he stated, it would depend on how close I was following the cars.

Q. Well, sure, if there is a car right smack ahead of you you can't very well see pavement in front of him. Now there was, I think you testified there was a car ahead of you and that that car changed lanes. Do you have any recollection of the

(Testimony of Lawrence Brown.)

manner in which he changed lanes? Perhaps I ought to be more specific. Did he suddenly swerve or was it a gradual swing out or what, was it a normal driving process or did it look like an emergency matter? [95]

A. Well, it didn't look like he changed too sharply.

Q. I think in your deposition your language was it was not like a last minute sort of thing. Is that still an accurate characterization of it?

A. Yes, sir.

Q. Now you applied your brakes?

The Court: Are you expecting to have this gentleman back after lunch in any case, in any event? I mean, is he going to be back here in any event? If he is I am going to suspend now. If it would convenience him and you think you could conclude in a few moments——

Mr. Rupp: I can finish inside, I should say, of fifteen or ten minutes.

The Court: Is he going to be back anyway, that is what I want to know? If he is going to be back anyway, I will suspend anyhow.

Mr. Casey: I would feel that I would want him back in any event.

The Court: I suspected that, so there is no point in going beyond this period. All right, you will have to return, Mr. Brown, I guess in any case. You may stand down, sir.

We will recess now, gentlemen, until approxi-

(Testimony of Lawrence Brown.)

mately two-thirty, maybe two-forty-five, somewhere. I'd like to be able to go forward at two-thirty. We have quite a large [96] group of petitioners for naturalization here and a little ceremony in connection with it, but you will be free until two-thirty. But I would appreciate if you would be able and ready to go forward at that time.

Mr. Casey: May I ask your Honor approximately to what hour you will continue then?

The Court: Approximately four-thirty.

Mr. Casey: Thank you, your Honor.

The Court: Very well, we will recess this case until two-thirty and Court will reconvene subject to call after the lunch period.

(Whereupon at twelve o'clock noon a recess was had until two o'clock p.m. at which time other matters were considered and following which, at 2:35 o'clock p.m., respective counsel heretofore noted being present, the instant case was resumed and the following proceedings were had, to wit:)

The Court: Ready to proceed?

Mr. Casey: Ready to proceed, your Honor.

The Court: Call the witness back. Mr. Brown, I think there was some additional examination.

Mr. Casey: Your Honor, I wonder if I might address a question to the Court before commencement of the afternoon session? [97]

The Court: Yes, of course.

Mr. Casey: Your Honor made the statement sev-

(Testimony of Lawrence Brown.)

eral days ago at the time of the signing of the pre-trial order that your Honor wanted to get all the testimony regarding liability in first and it occurred to me afterwards that you might have had in mind witnesses on both sides on liability.

The Court: Yes, that is what I did have in mind, was to suggest the possibility that we hear all the testimony about liability and conclude that phase of the case and determine if there be liability and if so as to whom and go forward then with the proof of damages of it. However, I am not, I leave it up to you gentlemen to consider that possibility. I thought it might save someone some time somewhere along the line, but——

Mr. Casey: It might very well, and if that were to be the order why I had already advised defense counsel that we would take approximately two days and a half in presentation of the plaintiffs' case, but of that two days and a half there would be in excess of half a day on medical testimony.

The Court: Well, you think about it in that light. If you want to separate, in other words, if we separate the issues we will try out the liability issues fully and conclude them and go forward with the evidence [98] and determination of damages following that, or if you prefer, we can go right ahead and try the whole thing. It is no matter to me. I just suggested it as a possibility of saving some time for someone.

Mr. Casey: Thank you.

The Court: Very well. I think you were examining?

(Testimony of Lawrence Brown.)

Mr. Rupp: I was, if your Honor please.

(Whereupon, the witness Mr. Brown resumed the witness stand for continued cross-examination by Mr. Rupp.)

Q. Mr. Brown, had you ever before driven a 2½ ton truck together with a trailer that weighed 8100 pounds that didn't have any brakes on it?

A. No, sir.

Q. This was your first happy experience with that sort of thing, is that right? A. Yes, sir.

Q. Now I think you said at some point, perhaps it was in your deposition, something about having slowed down some distance south of Mr. Casey's point when you first, when Mr. Casey first placed you on the highway, you recall? I think there was some testimony along the line somewhere about your having slowed down because of a traffic light. Was there a traffic light on this highway at any point? [99]

A. Yes, sir, south of the city limits there is a traffic light.

Q. About how far south, do you know?

A. Two blocks I believe.

Q. I see. And was that light red?

A. No, it was green.

Q. You came from the south and the light was green and the light remained green as you went through, is that correct? A. Yes.

Q. Did you reduce your speed at all?

A. Yes, I did.

(Testimony of Lawrence Brown.)

Q. And why did you do that?

A. Well, because mainly the light was green quite a while before I got to the light and I knew I couldn't stop in a hurry with it and I slowed down so that if it did turn red I could make the stop.

Q. And about how fast were you going at the point of the light, do you remember?

A. I believe it was less than twenty miles an hour.

Q. Now this truck that you were driving has a hydramatic transmission in it, does it not?

A. Yes, it does.

Q. And that, of course, is an automatic transmission and as I recall it has four speeds forward, is that correct? [100]

A. Well, in high range it has four forward, yes.

Q. Yes. And were you in high range?

A. I was.

Q. Do you have any recollection of what gear you were in at this point which Mr. Casey characterized as being three hundred, four hundred feet south of the scene of the accident?

A. I have no recollection, now, sir, but it must have been around second gear.

Q. You were not in top gear? A. No, sir.

Q. And also you were not in the first or very low gear? A. No.

Q. Now I want to clear up this matter of the curb lane because I think that you and I probably see eye to eye on it and probably all do, but I want to get the record straight. In your thinking how

(Testimony of Lawrence Brown.)

many lanes of traffic does South Tacoma Way have at this point that we are talking about?

The Court: Northbound lane?

Q. (Continuing): The whole South Tacoma Way, both north and south?

A. Four lanes sir.

Q. You regard it as a four-lane highway?

A. Yes, sir. [101]

Q. Just as I do. And right along the curb cars park, is that right?

A. I believe they do, yes, sir.

Q. And we could refer to that as the parking lane, could we? A. Yes, sir.

Q. Now, when you refer to being in the outside northbound lane you mean then the lane which is just west of this parking lane? A. Yes, sir.

Q. That is what I thought, where I thought you were, but I think the record was a little bit confused on it and I wanted to be sure. Now as I understand you, when you first saw this sign you looked to the left, did you? What did you do right after you saw the sign?

A. I immediately applied my brakes.

Q. And I think your verb was that you "tapped" your brakes? A. Yes, sir.

Q. And a short time later you applied the brakes again, is that right? A. Yes, sir.

Q. Do you know how much time elapsed between your first application and your second?

A. No, sir. [102]

(Testimony of Lawrence Brown.)

Q. I appreciate it is very difficult to measure. Your second brake application was a little bit harder than your first, is that right?

A. Yes, sir.

Q. Did you at any time slam on your brakes?

A. No, sir.

Q. In terms of the passage of the brake pedal do you know from its neutral position as it were, to the floor, have you any idea how far the pedal traveled on the first application or your second?

A. No, sir, I haven't.

Q. Well, this car, truck had only forty-two miles on it and presumably the brakes were in good shape, is that right?

A. They are in good shape on all of them.

Q. On the truck? A. Yes, sir.

Q. Now while you were driving north on US 99 on the morning of March 11th, will you tell us anything about your physical condition, were you sound of wind and limb? A. Yes, sir.

Q. It sticks in my mind you had an appointment with a physician, is that right?

A. Yes, sir. [103]

Q. In Seattle? A. Yes, sir.

Q. And I don't want to be impertinent, but why was that? Did it have anything to do with your physical condition?

A. I had had a cold and a headache.

Q. I sympathize with you. Did you have a headache at the time?

A. I guess I did, yes, sir.

(Testimony of Lawrence Brown.)

Q. Well, is there anything in your physical condition that would impair your driving?

A. No, sir.

Q. Eyesight was good and all that sort of thing?

A. Yes, sir.

Q. Do you remember whether or not the car that was alongside you when you tapped your brakes cleared your truck, that is, did it go by? It was overtaking you, I take it?

A. Yes, sir, it had gone by.

Q. It did go by? A. Yes, sir.

Q. Have you any idea when that was or where on the highway?

A. It was just about the time that I approached the sign. It was about the time that I hit the brakes the [104] second time.

Q. I see. But as I recall your testimony is, that the truck did not strike this first sign?

A. I don't believe it did, no sir.

Q. You think the trailer did though?

A. Yes, sir.

Q. At any rate something struck it and knocked it flying, is that right? A. Yes, sir.

Mr. Rupp: I think that is all I have of Mr. Brown.

The Court: Anything further from this witness?

Mr. Casey: Yes, your Honor.

(Testimony of Lawrence Brown.)

Redirect Examination

By Mr. Casey:

Q. Mr. Brown, on the day of the accident and thinking of your duties as one phase, as generally your duties being one phase as caretaker and one phase being a National Guardsman, on the day of the accident did you perform any duties other than those of a unit caretaker? A. No, sir.

Q. Now, with reference to orders under which you were proceeding on March 11th, if you recall I read Special Order No. 67. Was—what is the practice regarding [105] your actual receipt of written orders to go to Camp Murray?

A. Verbal, sir. I receive verbal orders.

Q. What is known as VOCO?

A. Yes, sir.

Q. Verbal Orders Commanding Officer?

A. Yes, sir.

Q. So as a matter of fact you don't too often see the orders written directed to you but are given to you by the commanding officer, is that correct?

A. Yes.

Q. Or somebody acting at the unit. Now on this particular day were you proceeding to Camp Murray to draw equipment in accordance with any regularly scheduled equipment draws? You have monthly draw dates, do you not?

A. Yes, sir; yes, sir, but I think this was a special draw date for the vehicles.

(Testimony of Lawrence Brown.)

Q. Now have you ever been injured while you were in the course of your duties as a caretaker?

A. Yes, sir.

Q. Where did you go for treatment of the injuries?

A. United States Public Health Hospital, Seattle.

Q. Why did you go there?

A. Well, we are covered by United States [106] Public Health Service for injuries received on the job.

Q. If you were injured in the course of your duties as a National Guardsman during the two nights or two hours a week, where would you have received your medical treatment?

A. If I was in Seattle it would be at Fort Lawton, sir.

Q. How close was your truck to the west curb of US 99 as you approached the scene of the accident? Do you understand my question?

A. Yes, sir, I am trying to think.

Q. In other words, with reference to the right-hand side of your truck about how close was that to that curb line?

Mr. Rupp: East curb line.

Mr. Casey: Strike the question. I mean the east curb line.

Q. As you approached the scene of the accident how close was the right side of your truck to the east or right-hand curb line?

A. Oh, I would say three feet, sir.

(Testimony of Lawrence Brown.)

Q. As you approached the scene of the accident did you at any time see any flashing red light on any of the Telephone Company equipment?

A. I don't recall. [107]

Q. As you approached the scene of the accident did you at any time see a red flag or flags on your side of the Telephone Company trucks?

A. I don't recall any, sir.

Q. When you first saw the warning sign to which you have testified did you see the entire sign and its legs at first?

A. No, sir, as I recall I saw just the yellow part of the sign.

Q. The top part of it? A. Yes, sir.

Q. And if this object that I am placing in front of you which is an iron rectangular framework with legs that appear to be about a foot high and with a yellow sign hanging in the middle of it saying "Men Working" had been the sign you saw as you, when you first saw the warning sign, would you have seen the portion below the yellow sign, from that down to the ground?

Mr. Rupp: If you know.

Q. (Continuing): If you know?

A. I don't recall seeing it, sir.

Q. It is your testimony that you saw the top and not the bottom, isn't that right?

A. Yes, sir.

Q. Did you see the top of the trucks as well when [108] you first saw the top of the sign?

A. Yes, sir, I know I saw the top of the truck.

(Testimony of Lawrence Brown.)

Q. You have towed a truck with a trailer without connecting brakes around military reservations before March 11th, hadn't you?

A. Jeep, sir.

The Court: You mean a trailer on a jeep?

The Witness: Yes, sir.

Q. As you approach the scene of the accident—by that I mean at the time you first saw this warning sign—in what gear were you driving?

A. I don't believe I know, sir.

Q. Now you testified in answer to Mr. Rupp's question that when you were three to four hundred feet back you were not in top gear but you were in high range, is that right? A. Yes, sir.

Q. Well, did you change gears between that time and the time you get up to the point of seeing the sign?

A. I believe I changed forward and back again, sir.

Q. Well now, I don't understand what that means. Can you explain to me?

A. Well, the truck gearshift is connected with the throttle on each and it shifts automatically according to pressure put on the throttle. In other words, if I [109] stepped on the gas it would—and gained speed—it would shift into a higher gear.

Q. Well, at the time you saw the sign were you in the highest gear you drive in? A. No.

Q. There are four of those gears, right?

A. Yes.

(Testimony of Lawrence Brown.)

Q. Well, was the highest one called first, first, second, third, fourth?

A. They are numbered from—first is low gear I believe, sir.

Q. First is the lowest of the high range, right?

A. Yes, sir.

Q. All right. Do you know then at the time you first saw the warning sign whether you were in first, second, third, or fourth of the high range gear?

A. I think I was in either second or third, sir.

Mr. Casey: That is all.

The Court: Anything further?

Recross-Examination

By Mr. Dovell:

Q. Mr. Brown, this morning you spoke of contact with army officers. Would you explain what you meant by that word "contact"? [110]

A. You are referring to the army advisors?

Q. Yes.

A. Well, when we were stationed in the armory we, they were stationed right there in the armory with us.

Q. In the armory? A. Yes, sir.

Q. At Seattle?

A. Yes, sir. We had contact with them in different ways every day.

Q. What nature of contact?

A. Asking for advice, even going to lunch with them as far as that is concerned.

(Testimony of Lawrence Brown.)

Q. Did any of them give you any orders?

A. No, sir.

Q. Just advice? A. Yes, sir.

Q. Was that instructive advice?

A. Yes, sir.

Q. I notice you say that you recognized the trucks at the time of seeing this sign "Men Working." Did you know what trucks they were?

A. Not immediately, no, sir.

Q. Did you know at that time when you saw the trucks, did you know whose trucks they were?

A. No, sir. [111]

Q. Did you know what they were there for at that time? A. No, sir.

Q. Was there anything on them that you could identify as to whose they were?

A. Not until after the accident, no, sir.

Mr. Dovell: That is all.

The Court: All finished with this gentleman?

Mr. Casey: I am, your Honor.

The Court: Very well, Mr. Brown, you are excused. You may leave at your pleasure.

(Witness excused.) [112]

CAPT. MARVIN GLEN WUBBENS

being first duly sworn on oath, was called as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination

By Mr. Casey:

The Clerk: State your full name and spell your last name.

The Witness: Marvin Glen Wubbens, W-u-b-b-e-n-s.

Q. You are not under army regulations, are you Captain? A. No, sir.

Q. What is your address, sir?

A. 821 - 83rd Avenue, Seattle, Washington,

Q. What is your military status now?

A. Now I am a National Guard officer, the S2 Officer of the 770th National Guard.

Q. S2 of what?

A. S2 Officer, 770th AAA Gun Batallion National Guard.

Q. What other miliary status do you hold? Well, you say you are a Captain.

The Court: You mean now?

Q. (Continuing): Now.

The Court: All right, go ahead.

A. Well, I hold the, a commission in the [170] Washington National Guard and also a commission of the Army Reserve Commission of the Army.

Q. That is what I had reference to. What is your serial number, Captain? A. O984607.

Q. What were your commissions on March 11,

(Testimony of Captain M. G. Wubbens.)

1953, the date of the accident between the army truck and the private car?

A. I was a battery commander of C Battery of the 770th Triple A Gun Battalion.

Q. When had you become Commanding Officer of Battery C?

A. Well, the 770th was on active duty approximately July of 1951.

Q. This was 1953. I don't think I quite follow you.

A. You asked me——

Q. When did you become——

A. The battery commander?

Q. Yes.

A. July, 1951, while we were on active federal service.

Q. Oh, I see. When you say on active service you mean in active federal military service?

A. This particular unit was called into service, mobilized. We were mobilized at the start of the Korean situation and we were on active federal service for a period [171] of two years.

Q. Well now, when did your unit—by “your unit” I mean Battery C of the 770th AAA Battalion—when did your unit obtain its release from federal service and revert to National Guard status?

A. That was July 14, 1952.

Q. Now as of July 15, 1952, the day after you got your National Guard status back, was Battery C of the 770th a federally recognized unit?

A. We were reverted back to the 770th Washington National Guard.

(Testimony of Captain M. G. Wubbens.)

Q. What I mean, as Battery C 770th Battalion of the Washington National Guard, you were still a federally recognized unit, weren't you?

A. As far as I know we were, yes, sir.

Q. Was Mr. Brown, William Brown, connected with Battery C of the 770th? A. He was.

Q. In what manner was he part of the Battery C of the 770th?

A. He was attached as the unit administrator and also as supply sergeant.

Q. Well, he was, prior to January, 1953, he was what is known as unit caretaker, wasn't he?

A. Unit caretaker. [172]

Q. And around January of 1953 didn't they change the designation "unit caretaker" to "administrative, supply and maintenance technician"?

A. Yes, sir, they did.

Q. Well, after January of 1953 was he the administrative, supply and maintenance technician of the Battery C of the 770th Battalion?

A. Yes, sir.

Q. How long did you continue in command of Battery C?

A. Oh approximately until August of that year, I believe, sir.

Q. August of 1953?

A. I believe right in there.

Q. Then you were Battery Commander of C Battery from July of 1951 until approximately July or August of 1953, and during that period from July of 1951 until July of 1952 this was, this

(Testimony of Captain M. G. Wubbens.)

battery and its battalion were on active federal military duty? A. Yes, sir.

Q. And then between July of 1952 and July or August of 1953 it was a National Guard unit?

A. Yes, sir, it was.

Q. Now at the time that this unit went from active federal military service to National Guard service, what [173] was done with its equipment, its trucks, its vehicles?

A. When we reverted from active federal service back to our National Guard service?

Q. Yes.

A. We left all our equipment with the parent unit that they just changed the name of the unit. We left our equipment with them. The 770th reverted to the 83rd Gun Battalion. They kept the equipment. We moved in name and men only back to National Guard Service.

Q. Where had you been in active duty, at Hanford? A. Yes, sir.

Q. When you came from Hanford to Seattle you brought men and nothing else, is that right?

A. That is correct, sir.

Q. Well, from that time on, from the time you got back to Seattle with men only, were you in the process of drawing new equipment?

A. We were, sir.

Q. Now in the spring of 1953, how many days a month did you hold National Guard drills?

A. We had drill night every Monday night, approximately four days of the month.

(Testimony of Captain M. G. Wubbens.)

Q. And that was always on Monday night?

A. As a rule, yes, sir.

Q. Now was Brown a sergeant in Battery C of the 770th? [174]

A. He was, sir.

Q. And as such would he report for drill each Monday night?

A. He did, sir.

Q. And was he required to report for drill in his military uniform?

A. He was.

Q. And did he so report always in his uniform?

A. He did, sir.

Q. What other duties, if any, did Brown occupy with reference to Battery C of the 770th?

A. In his military portion or civilian portion?

Q. As civilian portion.

A. He was the unit administrator and caretaker. He was the caretaker of that unit.

Q. I am going to call him a caretaker because it is easier to do so, but on the understanding that prior to January of 1953 he was officially designated as caretaker and that during and after January of 1953 he would be referred to as administrative, supply and maintenance technician. Is that agreed?

A. That is substantially correct, yes, sir.

Q. That is the way the fact was, wasn't it?

A. Yes, sir.

Q. Now are you familiar—were you familiar on or prior [175] to March 11, 1953, with the federal law and the army regulations and National Guard regulations relating to caretakers?

A. Basically I was.

(Testimony of Captain M. G. Wubbens.)

Q. Well, prior to and on March 11, 1953, did you prescribe any duties for Brown that were not his primary duties as unit caretaker?

Mr. Dovell I am going to object to this question. It calls for a conclusion and a legal one at that.

The Court: Well, that is what is going, the question that is going through my mind. I think you had better lay the groundwork for the matter in any case. It is not entirely clear to me what you have in mind. Do you understand what he means by the term "primary"? What is the term?

Mr. Casey: Primary duties as a unit caretaker.

The Court: Do you understand what he means by that term?

The Witness: By the term that he has—there is a set policy or set wording in, that they have set up that the man is responsible to do.

The Court: Yes.

The Witness: Knowing those verbatim I couldn't tell you, but I know just approximately what he was supposed to be doing.

Mr. Casey: Well, I might ask that [176] question, if your Honor please.

The Court: Yes, the thing about it is, you see, that the question assumes that he knows what you mean by that term and there might be some doubt about that. My own acquaintance with army regulations is there are a great many in them that even a seasoned and experienced officer wouldn't understand or know anything about.

(Testimony of Captain M. G. Wubbens.)

Mr. Casey: If your Honor please, I will withdraw the question and I will ask in its place:

Q. (Continuing): Prior to March 11, 1953, were you familiar with the primary duties of a unit caretaker? A. Yes, sir.

Q. What were those duties?

A. As caretaker, the care and maintenance of the equipment that the unit had, to take care of the personnel files of the men that we had to pick up and receive any organizational equipment assigned to us, and——

Q. Pick up where?

A. Any place that would be designated to receive these articles. Could be—Camp Murray was the normal supply station, but if there was a different station where we had to go to receive them, why he would go there.

Q. Well now, under—strike that. Did you ever prescribe any duties for Brown as a unit caretaker other than the primary duties that you have described? [177]

A. Oh, I suppose I could have at one time or another, not being able to recall specifically it would undoubtedly come under his orders that he was.

Q. Is there any doubt in your mind as to whether the drawing of equipment at Camp Murray was part of his primary duty as a unit caretaker?

A. That was one of his specific duties.

Q. Now in 1952 towards the end of 1952—I use the end of 1952 as a dividing point because you have

(Testimony of Captain M. G. Wubbens.)

some new regulation that comes out then, but at the end of 1952 in your table of organization, how many civilian personnel were allotted to your unit?

The Court Now when you say "unit" are you talking about the whole battery or the Company C?

Mr. Casey: I should make it more specific.

Q. (Continuing): Battery C of 770th.

A. Battery C under TO we had a hundred and six men and four officers.

Q. I'd like you to answer with reference to civilian personnel.

A. We were allotted before 1952?

Q. In 1952? A. 1952.

The Court: You mean after they were inactivated?

Mr. Casey: Yes. [178]

The Court: After you were relieved from active duty.

Q. July of 1952.

A. To the best of my recollection we were allotted two, but I only had one and then after that was changed specific to just one.

Q. Do I understand, to clarify it for the Court, is this correct, Captain, that according to Table of Organization for a National Guard company, specifically, Battery C, before January of 1953 they had an administrative assistant under Table of Organization and a unit caretaker?

A. Yes, sir.

Q. Is that correct? A. That is correct.

(Testimony of Captain M. G. Wubbens.)

The Court: You had the positions on the TO but you didn't have the bodies?

The Witness: Yes, sir.

Q. And that one man was Mr. Brown, is that correct?

A. He could have been in my battery then.

Q. He was in Battery C for at least for six months prior, the last six months of 1952 he testified how far it was and it goes back some time, but at least he was in? A. He was there prior.

Q. So that those two Table of Organization positions that have administrative assistant and unit caretaker were [179] filled by Brown, is that correct? A. Yes, sir.

Q. Now do I further understand correctly that by virtue of a regulation, National Guard regulation, that came out early in January of 1953, supplemented by some additional stuff from the National Guard Bureau, that those two positions of the administrative assistant and caretaker were merged? A. They combined.

Q. Into what is called an administrative, supply and maintenance technician? A. Yes, sir.

Q. Was Brown that administrative, supply and maintenance technician in January, February, and March of 1953? A. Yes, sir, he was.

Q. And as such administrative, supply and maintenance technician, did his basic primary duties include the drawing of unit equipment from Camp Murray? A. Yes, sir.

(Testimony of Captain M. G. Wubbens.)

Q. Captain, in 1953, early 1954, what was your procedure regarding the drawing of equipment?

A. We drew equipment once a month from Camp Murray.

Q. Was there a set day when that was done?

A. Set day unless there was a specific route. We had a set day to go to Camp Murray and pick up our equipment. [180]

Q. Were orders issued regarding the picking up of that equipment?

A. Would you say that again?

Q. Were orders issued to pick up that equipment? A. Yes, sir, they were.

Q. Who issued the orders?

A. Those orders would come from Camp Murray stating that the equipment was ready to be received.

Q. And telling you to pick it up on that date?

A. Yes, sir.

Q. Were those orders issued to the caretaker?

The Court: You mean the paper itself, or—
Mr. Casey: No.

Q. (Continuing): Were the orders in their form directed to the caretaker to perform the duty of coming to Camp Murray to pick up the equipment?

A. It was directed to the commanding officer who would show it to the caretaker or it would be a verbal. We wouldn't specifically get the orders physically every time.

Q. But an order would be cut by Camp Murray, is that right? A. Yes, sir.

(Testimony of Captain M. G. Wubbens.)

Q. And then what would the unit caretaker himself get, what do you call it, VOCO? [181]

A. He would get verbal orders from the commanding officer. Not from the commanding officer every time, sometimes from the officer on duty at the armory.

Q. Are you familiar with the order under which Mr. Brown went to Camp Murray on March 11, 1953, to draw equipment? A. Yes, sir.

Q. Was that order directly in his capacity as unit caretaker? A. Yes, it was.

Q. Did the other unit caretakers of the battery go under the same order the same time to draw equipment? A. They did, sir.

The Court: About how long do you think you will be with Captain Wubbens?

Mr. Casey: Sir, I would say, golly, I will be at least twenty minutes and I am sure there will be cross-examination.

The Court: That is what I am concerned about. I'd like to accommodate you, Captain, so you wouldn't have to return but I am afraid it will be too long because I have another matter that I must attend to tonight also. So I think regretfully I will have to invite you back again tomorrow. And we will recess this case until tomorrow morning. Is the hour of nine-thirty agreeable to all of you? [182] Whether agreeable or not, that will then be the order of the day, nine-thirty. Did you have something?

Mr. Casey: I wonder if I might, on one brief

(Testimony of Captain M. G. Wubbens.)

point before we recess, your Honor, ask if, I'd like to offer the medical exhibits, the hospital records and X-rays by number at this time.

The Court: Well, they have all been admitted according to my record excepting 20 which is the one from St. Peters in Olympia.

Mr. Casey: I would like to offer 20 at this time, if your Honor please.

Mr. Rupp: No objection.

Mr. Dovell: No objection.

The Court: Very well, Exhibit 20 is admitted. So we now have 18, the map, 19, the group of ten prints and Officer, well the police officer and the 20, 21, and 22 of the various hospital records and X-rays, all those are admitted up to this date.

(Plaintiffs' Exhibits 18-22 admitted in evidence.)

All right now, Captain, you can step down if you will. We will recess this case until nine-thirty tomorrow morning. You gentlemen may now retire if you wish. Do so as quietly as you can while I attend to another matter here. It includes 17 as well. [183]

(Whereupon, at four-thirty-five o'clock the instant case was recessed and other matters considered until four-fifty o'clock p.m., at which time court was recessed.) [184]

April 12, 1955; 9:30 A.M.

CAPT. MARVIN GLEN WUBBENS

having been previously sworn on oath, was recalled as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination

(Continued)

By Mr. Casey:

Q. Captain, I believe at the close of yesterday's session I had asked you whether the unit caretakers of the 770th went down to Camp Murray together to draw equipment? A. They did, sir.

Q. And did they assist each other in the drawing of equipment for the entire battalion and the returning of it to Seattle? A. They did, sir.

Q. Captain, you stated yesterday that the unit had been on active duty, that is, in the active federal military service until about July of 1952, some nine months prior to this accident. Now during the time that the unit was on active federal military duty was it in the process of receiving the new 2½ ton trucks from the United States?

A. They were, yes, sir.

Q. Were they at that time, was the battalion at that time turning in its old 2½ ton trucks?

A. We were, sir.

Q. Was that in accordance with orders received from higher authority? [187] A. It was.

Q. Did you as battery commander of Battery C

(Testimony of Captain M. G. Wubbens.)

have any discretion in whether you turned in an old 2½ ton truck?

A. I was ordered to turn one in, yes, sir.

Q. And did the old 2½ ton truck or trucks that were turned in have the old low voltage electrical system? A. They did, sir.

Q. And did that low voltage electrical system on the 2½'s coincide with the voltage system on the four-wheel trailers? A. They did, sir.

Q. What was the purpose for use of the four-wheel trailers?

A. To haul our generators and to haul the electrical fire control equipment.

Q. Is that big equipment? A. It is, sir.

Q. Is that always, is that type of equipment always carried in these four-wheel trailers?

A. Standard, yes, sir.

Q. This four-wheel trailer differs from the usual trailer used by the military, doesn't it? Isn't the usual trailer a two-wheel trailer?

A. The two-wheel is a cargo trailer. [188]

Q. The two-wheel is what?

A. Cargo, sir, cargo trailer.

Q. And what was, and is, the vehicle that pulls the four-wheel trailer?

A. Two and one-half ton, sir.

Q. Now when you were on active duty and prior to the time that you—well strike that. In your battery when you were on active duty do you know how many of the four-wheel trailers you had?

A. I had four trailers that mounted generators

(Testimony of Captain M. G. Wubbens.)

and one trailer that mounted one director, total of six trailers.

Q. Well now, after you had started turning in the old 2½ ton trucks, when you were on active duty and you had received new 2½ ton trucks, those new 2½'s had the heavy voltage, the twelve or twenty-four volt electrical systems, didn't they?

A. They did, sir.

Q. Were you required while on active duty in the performance of your military mission to pull the four-wheel trailers with the six volt electrical system with the new 2½ ton trucks with the twelve or twenty-four volt electrical system?

A. Yes, sir.

Q. Did you at that time have any conversion units which would permit the electrical system of the trailer [189] to be fastened to the electrical system of the truck?

A. Not to my knowledge, no, sir.

Q. So that when you were on active military service with the unit were you pulling four-wheel trailers with 2½ ton trucks without any brake connection between them?

A. We did, sir.

Q. And was that necessary to perform your military mission?

A. It was.

Q. Do you know at about what time conversion units were received by your unit to hook the old 2½ ton trailer with the new two and a half ton truck?

A. Sometime in 1954, sir, if I recollect right.

(Testimony of Captain M. G. Wubbens.)

Mr. Casey: We have several questions of repetition.

Q. Can a jeep or quarter ton truck pull one of these four-wheel trailers?

A. It might be able to in an extreme case where you had to get, but as a standard rule it would be quite impossible to.

Q. You mean extreme emergency?

A. Extreme emergency.

Q. The drawbar level is different on the two isn't it?

A. The trailer would drag, sir. [190]

Q. What are the caretaker's hours of duty in say March of 1953?

A. From eight to four-thirty, sir.

Q. On the day of this accident, March 11, 1953, did Brown perform any duty that would be compensated for as drill time as a member of the Battery C?

A. During that day, sir?

Q. During that day? A. He did not.

Q. In the event that Brown were to have received an injury in the course of his duties as a caretaker, where would he have gone to receive medical treatment?

A. Marine Hospital, sir.

Q. In the event that Brown had received injuries in the course of his duties as a National Guardsman during the drill time which you had once a week, where would he have received medical treatment?

A. Emergency medical would be received at

(Testimony of Captain M. G. Wubbens.)

Fort Lawton and then he'd be evacuated to Madigan.

Q. Madigan?

A. Madigan General Hospital.

Q. Madigan General Hospital at Fort Lewis?

A. Yes, sir.

Q. On the date of the accident was it necessary to perform your military mission that the four-wheel trailer [191] with the six volt electrical system be pulled by the 2½ ton truck with the twelve or twenty-four volt electrical system?

A. That is all we had, sir.

Q. Is your answer yes? A. Yes, sir.

Q. What was the purpose of your obtaining the equipment that was being returned to your unit in Seattle at the time of the accident?

A. The piece of equipment that was on the trailer was our director and we were preparing to go to Summer Encampment for firing practice.

Q. Just very briefly, what is a director?

A. It is the computer and director that is the gun laying equipment that points the gun at the moving target. It computes the problem.

Q. In other words, without that you can't hit the target, isn't that about it?

A. That is about it, yes, sir.

The Court: Used to hit them before they had those things, but it helps.

Mr. Casey: I have no further questions.

The Court: Cross-examine Mr. Dovell. [192]

(Testimony of Captain M. G. Wubbens.)

Cross-Examination

By Mr. Dovell:

Q. Captain, the hospital at Fort Lawton and the hospital at Madigan are both army hospitals?

A. Yes, sir, they are.

Mr. Dovell: That is all.

Mr. Rupp: I have none.

The Court: That is all, Capt. Wubbens, you are excused and may leave at your pleasure. Call another witness please.

(Witness excused.) [193]

* * *

GENERAL WILBURN H. STEVENS

being first duly sworn on oath, was called as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination

By Mr. Casey:

The Clerk: State your full name and spell your last name.

The Witness: Wilburn H. Stevens, S-t-e-v-e-n-s.

Q. Will you state your address, sir?

A. Camp Murray, Fort Lewis, Washington.

Q. Are you a member of the Armed Forces?

A. Yes.

Q. In what capacity, sir?

A. As the Adjutant General of the Washington National Guard.

(Testimony of General Wilburn H. Stevens.)

Q. And what rank do you carry?

A. Major General.

Q. Do you carry the commission in the United States Army?

A. In the Army of the United States.

Q. What is the nature of that commission, sir?

A. I am federally recognized at the present time as a Brigadier General and the papers are in for recognition as a Major General.

Q. And in your official capacity at this time, sir, is what? [194]

A. As the supervision and training of the Washington National Guard under the direction of the Governor.

Q. As the Adjutant General of the Washington National Guard? A. Yes.

Q. And did you, sir, occupy that same position—strike that. How long have you been, occupied that position continuously?

A. Since 1 August, 1949.

Q. Sir, I wonder if you could tell us about the manner and nature of hiring of civilian personnel known as unit caretakers such as the position occupied by Sergeant Brown of Battery C of the 770th Anti-Aircraft Battalion in March of 1953?

A. We are authorized a certain number of civilian technicians by Table of Organization from the National Guard Bureau. The specifications for this type of man for the particular job is set up by the National Guard Bureau under the direction of the Department of the Army and usually the unit com-

(Testimony of General Wilburn H. Stevens.)

mander selects a man from his unit because the man, if he is to act in the capacity of the caretaker, he must be in the unit where he takes care of the property. Therefore, the unit commander is usually the man who hires the man and the papers are sent forward to my headquarters. [195]

Q. Would it be proper to say the unit commander recommends the hiring of him, sir?

A. I think that would probably be better. There are—we have a personnel officer who interviews the man insofar as qualifications are concerned and makes certain that he fits the specification for the particular job.

Q. What part does the United States Property Disbursing Officer have in the selection of this man?

A. Well, the officer who is the personnel officer is a part of the people who are to assist him in his job and he is the man who interviews the applicant.

Q. Personnel officer assists the United States Property and Disbursing Officer?

A. That is right.

Q. Just what is the status of the United States Property and Disbursing Officer—I think you refer to him as U.S.P. & D.O.?

A. United States Property and Fiscal Officer at the present time.

Q. Fiscal Officer it is known? What is his function and purpose?

A. Well, he is a National Guard officer of the certain qualifications who is recommended to the Department of the Army through the National

(Testimony of General Wilburn H. Stevens.)

Guard Bureau to be called to active duty to serve in that capacity for the State of [196] Washington.

Q. Well, when you say called to active duty, when he is on active duty is he in the active federal military services?

A. He is in the Army of the United States.

Q. Now where do you get—where do you obtain your authority with reference to the hiring of these caretakers?

A. From the National Guard Bureau.

Q. And that in turn comes from the federal statute, does it?

A. The National Guard Bureau is a part of the Department of the Army set up to supervise the National Guard.

Q. Do you in your establishment hire civilian personnel directly under the authority of the Governor?

A. Yes, we have about sixty-five people at the present time.

Q. Now those sixty-five people, are they separate so far as hiring and firing from the caretakers? A. They are.

Q. And would the Governor through you have full and absolute and final authority to fire these sixty-five civilian personnel? A. He would.

Q. Would the federal government have any control over that firing function? [197]

A. Not of the state employees.

Q. Not of that sixty-five, approximately sixty-

(Testimony of General Wilburn H. Stevens.)

five employees? A. No.

Q. Does the federal government exercise any jurisdiction over the firing of the unit caretakers?

A. That authority is delegated to me through federal orders.

Q. And that is entirely separate from the sixty-five civilian employees that you hire?

A. That is right.

The Court: That is not entirely clear to me, General Stevens. You mean that, with respect of these unit caretakers that you have some separate authority with respect of hiring and firing separate that is from the authority you derive through the Governor?

The Witness: Yes, sir, that is set up by federal statute.

The Court: Do you get that authority by virtue of your capacity as an officer in the Army of the United States, or do you get it by virtue of your capacity as Adjutant General of the Washington National Guard?

The Witness: Well I would say both, sir. You see I hold a dual status.

The Court: Yes, I understand you have "two hats." [198]

The Witness: That is right, sir.

The Court: What I am concerned about at the moment is with respect of your authority over unit materiel caretakers. Is there a clear, sharp division of your authority there stemming in the one case from your capacity as an officer of the Army of the

(Testimony of General Wilburn H. Stevens.)

United States as distinguished from your capacity as an officer of the State of Washington?

The Witness: I would say so, sir. You see these people are hired, the salary range and the specifications and everything comes from the National Guard Bureau and in general the ratings and so forth are very similar to civil service. In fact they follow the civil service scale pretty close although they are not civil service and the handling of those particular employees who are paid from federal funds is carefully laid out in regulations.

The Court: Thank you, go ahead, excuse the interruption.

Q. I wonder, sir, if you could explain briefly the distinction between, or the problem of changing from one to the other on this unit materiel caretaker and administrative, supply and maintenance technician?

A. Well, that is a little difficult, but I will try. Prior to the change we had two men, Table of Organization that is, for permanent employees paid from federal [199] funds allowed us two men per battery or company. A survey indicated that it wasn't necessary to have two people so we made—except in certain units where they had a tremendous amount of equipment.

Q. Did the federal authorities make that survey?

A. That is right, and they decided to change and take away one man with the exception of a few companies, very large companies with a tremendous amount of equipment, and change the

(Testimony of General Wilburn H. Stevens.)

name of the man who occupied the job since he would not only do mechanical work, but he would do clerical work as well.

Q. And the name they assigned was administrative, supply and maintenance technician?

A. That is right, about fifty per cent of his work is, or maybe more, is taken up with keeping the papers in order.

Q. Now, sir, I notice in some of the directives and regulations a reference to primary duties of a caretaker or administrative, supply and maintenance technician—and I think I will refer to him for brevity as a caretaker although we know he is something else after January, 1953. I notice reference to primary duties of the caretaker and additional duties of the caretaker. What, as of the time of this accident, March 11, 1953, what were the duties of this caretaker? [200]

A. Well, to enumerate them entirely would be most difficult.

Q. Generally speaking as to the primary, primary duties in a broad form?

A. Well, he was responsible for——

The Court: Are you speaking now of primary? You left the word “primary” out.

Mr. Casey: I left that out.

Q. And I should clarify it, General. My question is with reference to the primary duties of the caretaker in March of 1953?

A. Well, he was to take care of all of the property issued to that battery and take proper pre-

(Testimony of General Wilburn H. Stevens.)

cautions, preserving the materiel. For instance, you have a great deal of wool. You have to put moth-balls in it. If you have ever walked into an army supply room you will know. He had a great number of weapons that required constant attention and they have to be cleaned and oiled and things of that kind. And of course the vehicles, his primary duties was to do what we term first echelon maintenance, that is, keep proper amount of air in the tires, the battery, sufficient amount of water in it, and that sort of thing, and he was to take care of the necessary paper work which comes to every battery office along—he was the right-hand man to the unit commander in getting this paper [201] work accomplished. Payrolls, morning reports, sick report, report of change and a thousand and one reports which are required which the company commander, being only a part time man, he can't take care of that. Usually they meet together and decide what work is to be done and it is laid out and the caretaker or technician goes ahead and completes the work for which the unit commander inspects it, signs it and it goes forward.

Q. State whether the receipting for and obtaining of equipment from the National Guard headquarters was a part of his primary duty?

A. It was.

Q. Is there any question but what that was part of his primary duty? A. None in my mind.

Q. What was the general procedure by which equipment was drawn by the units?

(Testimony of General Wilburn H. Stevens.)

A. Well, we have a large truck, a van which is pulled by a tractor which makes a monthly tour of the state and delivers considerable quantities of equipment and supplies. However, we found it necessary for the unit caretaker to come in on an average of about once a month in order to keep clothing and other supplies in sufficient quantities for the unit, and therefore draw-days were set up for each unit and they came in on that particular [202] day and drew their equipment and supplies. Now in the case of a change of equipment that was set up usually as a special day as I think it was in this case.

The Court: Counsel has an order, it will only take a moment to sign. (Referring to another matter and other counsel.) The witness can be examining whatever you wish.

(Whereupon, the other matter was considered and the instant case resumed.)

The Court: Go ahead, Mr. Casey.

Q. Sir, you have been handed Plaintiffs' Exhibit 16 entitled——

Mr. Casey: I wonder if I might——

The Court: Yes, go ahead.

(Whereupon, counsel approached the witness.)

Q. (Continuing): ——entitled “Revised Field Civilian Personnel Program, Project 1213, Issued 22 December, 1952, by Departments of the Army and the Air Force, National Guard Bureau, Wash-

(Testimony of General Wilburn H. Stevens.)

ington, D. C.," and directed to the Adjutant Generals of the various states. Now I will ask you, sir, whether the listing of duties on the last two pages of that ten or fifteen-page document lists the basic, the primary duties of the caretaker? I think it is the last two pages that refer to it, which are headed "Administrative, Supply and Maintenance Technician." I wonder if you [203] could locate that, sir, if you haven't already, and tell us whether that shows the primary duties of this caretaker or technician? A. Yes, it does.

Q. I believe on the first of those last two pages, sir, reference is made to the receipt, receipting for equipment. I wonder if you could glance through and find that portion? I have the same thing.

A. Yes, it is paragraph 2, "Responsible except during field training periods, to that commander for the receipt, care, maintenance and repair of unit equipment."

Q. Sir, what interpretation is placed on the term "receipt" in that instance?

A. Well, he might sign a temporary receipt for a vehicle although the final papers would have to be signed by the unit commander since he is charged with all of that, but he could go to my headquarters and make a temporary receipt for certain equipment and take it back to the unit where it would be checked by the company commander and later he would sign a permanent receipt for it.

Q. In other words, is it understood by the term "receipting for equipment" that it is determined

(Testimony of General Wilburn H. Stevens.)

that he goes from his unit to Camp Murray to obtain and receipt for equipment?

A. Yes. He cannot sign a permanent receipt because [204] he is not an officer. The unit commander signs for all property of the unit.

The Clerk: Plaintiffs' Exhibit number 23 has been marked for identification.

(Plaintiffs' Exhibit 23 marked for identification.)

Q. Sir, handing you what has been marked Plaintiffs' Exhibit 23 for identification, being National Guard Regulation number 75-16 from the Department of the Army dated 7 January, 1953——

Mr. Casey: I might say, your Honor, that it is that which your Honor was handed at the beginning of the trial.

The Court: The same I have, 75-16?

Mr. Casey: Yes, your Honor, and 7 January, 1953.

Q. (Continuing): I will ask you, sir, whether the regulation that you have just been handed is the changed regulation relative to the caretaker or supply maintenance technician?

A. This is the current regulation which governs our federal civilian personnel program.

Q. And the paper we handed you just a few minutes ago, batch of papers, Plaintiffs' Exhibit 16, does that expand or carry into effect the regulation, the 75-16 that you have just been handed? [205]

A. It supplements. Oftentimes they come out

(Testimony of General Wilburn H. Stevens.)

with a change in this form before it comes out in this form, a permanent form.

Q. Comes out in pamphlet form before it comes out in——

A. Oftentimes this method is used to supplement as well, supplement information.

Q. Now those directives are coming to you from the Federal Government, are they not?

A. Yes, Department of the Army.

Mr. Dovell: I must object to the word “directives” at this stage, your Honor.

The Court: Beg pardon?

Mr. Dovell: I object to the word “directive.”

The Court: Well, I have lost it.

Mr. Dovell: I think this is supervisory information and not a command.

The Court: Well, you will have to bring that out on cross I think at this point.

Q. Sir, to your knowledge, are the unit caretakers, particularly are unit caretakers of the 770th given any duties to perform that are not primary duties set forth or derived from the regulation 75-16?

A. Well, not to my knowledge. The man wouldn't have to do the work if it was against the rules. [206]

Q. Well, has your headquarters designated any additional duties to be performed by that caretaker, any duties in addition to what he is required to do by the federal regulation?

A. Not to my knowledge.

(Testimony of General Wilburn H. Stevens.)

Q. Are you familiar with the practice—strike that.

Are you familiar with the procedures in other states and territories and the District of Columbia for picking up of equipment by the unit, that is, the battery or battalion level from the state National Guard headquarters?

A. Well, the system is similar all over and the duties insofar as I know they do exactly the same thing in drawing equipment in all of the states and territories as they do in my own.

Q. Well, in the rest of the states and territories and so far as you personally know, do the caretakers of the battalion of the individual units pick up the equipment or much of the equipment from the state guard headquarters?

A. National Guard Headquarters?

Q. National Guard Headquarters, excuse me.

A. Yes, they do. In some cases for instance in the state or the U.S.P.&D.O. and U.S.P.&F.O. office is not located near the Adjutant General's office. You have that little difference but they do go in the U.S.P.&F.O.'s office in order, and draw the equipment the same as they [207] do now, but it is not near the Adjutant General's office.

Q. How does the equipment get to the U.S.P.&D.O. office to some place up above?

A. F.F. it is on automatic issue. You see each organization is set up with a Table of Organization for personnel and the Table of Equipment. This Table of Equipment prescribes the equipment for

(Testimony of General Wilburn H. Stevens.)

that unit. Much of it is automatically issued by the Department of the Army and comes to the U.S.P.& F.O. and it is earmarked, marked right on the vehicles, we will say, or guns, to what outfit to go.

Q. Even down to the battery level?

A. Oh, yes, and on other supplies is largely by requisition.

Q. Now, your vehicular equipment, your big trailers, your computers, things of that nature, would they come from the Federal Government earmarked for the unit?

A. That is right, automatic issue.

Q. In other words, you don't have anything to say about it, you have a Table of Organization, you have a Table of Equipment. If the unit does not have a certain item if required under the Table of Equipment it automatically comes down?

A. That is right.

Q. That comes down from the Federal Government? [208]

A. They occasionally make a mistake, they don't give us all the equipment. Then we of course could make a special requisition, but as a rule, as a rule it is automatic issue.

Q. And such items as computers and big trucks and big trailers are automatic issues, is that right?

A. That is right.

The Court: Is the equipment the same for a National Guard unit as for an Army, regular Army unit?

(Testimony of General Wilburn H. Stevens.)

The Witness: Yes, sir, the law requires that we must conform to Army standards of training, use the same equipment, same Tables of Organization.

The Court: What was the 101—was it, table for equipment? I can't remember the number of it now.

The Witness: Well, each organization has a little change in its Table of Organization. If it is artillery it has one, if it is tanks it has another and so forth.

Q. Sir, what is the means by which the United States determines whether the National Guard is properly performing its mission?

A. By various methods. First we have certain officers detailed to the state and to each unit.

Q. Will you describe them, their function?

A. They are the Army Advisory Group and they are headed by a Colonel, whose office is in my headquarters, [209] and each unit has officers and non-commissioned officers assigned to this instructor group who constantly supervise their training.

Q. They are regular Army officers?

A. They are regular Army officers detailed for that purpose. Once each year, at least once each year we have an inspection of each unit by an inspector general of the Army who makes a detailed report on that unit.

Q. He is not in any way connected with the National Guard?

A. Not in any way. He comes from Sixth Army as a rule, detailed from Sixth Army, San Francisco. In addition to that we have various teams

(Testimony of General Wilburn H. Stevens.)

who come in from the big depots like for instance the signal team to examine all items of signal equipment, engineering team to examine items of engineering equipment, quartermaster team to examine items of the quartermaster and so on.

Q. How about caretakers' teams, come in and examine caretakers, sir?

A. Well, on any of these inspections if there is anything very much wrong the caretaker is the man who is in the bite of the line.

Q. I will ask you, sir——

The Court: All teams inspect him, in other words? [210]

The Witness: Yes, sir.

Q. (Continuing): I will ask you, sir, whether the inspection procedure in the regulations prescribing inspection procedure don't prescribe specifically for inspection of the caretakers by the inspector general's department?

A. Yes, I believe they do. I am not absolutely certain on that point.

Mr. Casey: I wonder if we might see Exhibit, Government Exhibits 2 and 3 and 4.

The Clerk: Should be referred to as A-2, A-3 and A-4.

Mr. Casey: I might say to your Honor that in accordance with the pretrial order insofar as Government Exhibits were concerned, that the order provides that as to Defendant United States of America's exhibits marked for identification as 2 through 6, inclusive, it is stipulated that they are

(Testimony of General Wilburn H. Stevens.)

what they purport to be and as to the portions admissible, if any, may be admitted without further proof, and then it proceeds to list these various envelopes.

The Court: Yes, I recall that. Do you want them admitted at this time?

Mr. Casey: If your Honor please, insofar as Defendant United States' Exhibit A-2 is concerned, we will offer it with this statement, that some of the regulations [211] therein stated may not be in force at this time and there are very numerous and various regulations, many without any relation to the other, but we would offer Defendants' Exhibit A-2.

The Court: Well——

Mr. Dovell: I am offering——

The Court: A-2 consists obviously of a large number of regulations. It would be quite apparent that only a very small fraction of them could possibly have any relevance to this case, I would think.

Mr. Casey: That is correct.

The Court: But for the purpose of convenience as far as I am concerned you can admit the whole thing with the understanding that if anybody can find anything in there that is relevant and was in force and effect at the time of the accident, why we will consider that and the rest of it we won't.

Mr. Casey: That is correct, your Honor.

The Court: But I am certainly going to rely on counsel to point it out. I don't intend to spend the evening going through that voluminous material.

(Testimony of General Wilburn H. Stevens.)

Mr. Casey: We are offering A-2.

The Court: It is admitted.

(Defendant's Exhibit A-2 admitted in evidence.) [212]

Mr. Casey: Now with reference to Defendant United States of America's Exhibit A-3, we will offer that with the exception of the large pamphlet at the rear of this collection of regulations which is entitled "Air National Guard Regulations, Department of the Air Force, Washington 752" which has nothing whatsoever to do with the matter in issue, so we would offer——

The Court: I can't tell that, but so far as I am concerned you can put——

Mr. Dovell: That is satisfactory to the Government, your Honor. That hasn't anything to do with it but at the same time it is in the same office so it had to be certified.

The Court: Why don't you take it out at a convenient time, take it out?

Mr. Dovell: Certification is made upon all the documents that are contained in that.

The Court: Physically remove the thing at some convenient time because we are going to have enough material in this record that is not pertinent without adding further, so if you both agree that it has got nothing to do with it, why take it out and you can keep it as a souvenir or read it for your vacation this summer or something of that kind.

Mr. Casey: Thank you, your Honor. [213]

(Testimony of General Wilburn H. Stevens.)

The Court: All right.

Mr. Casey: Is it so admitted on that?

The Court: Yes, it is.

(Defendant's Exhibit A-3 admitted in evidence.)

Mr. Casey: I believe your Exhibit 4 contains——

The Court: It would be A-4, of course.

Mr. Casey: Excuse me, Government's Exhibit A-4, that contains older regulations on the same thing.

Mr. Dovell: I think that contains that NGB circular 4 which many of the cases refer to.

Mr. Casey: Yes, although not in force at the time, it would undoubtedly be helpful to the Court because some of the prior cases were decided with reference to that.

The Court: I see.

Mr. Casey: With that understanding we will offer Defendant's Exhibit A-4.

The Court: All right, let's admit it under the same understanding. It is admitted and it will be incumbent upon counsel to point out those portions of it that the Court should consider.

Mr. Casey: Thank you, your Honor.

(Defendant's Exhibit A-4 admitted in evidence.)

The Court: Is there anything further of General [214] Stevens?

(Testimony of General Wilburn H. Stevens.)

Mr. Casey: Yes, your Honor, I wanted those so I could speak to him about regulations.

The Court: Very well.

Q. Directing your attention, sir, to the Department of the Army, S.R., what is an S.R.?

A. Special regulations.

Q. Department of the Army Special Regulation 20-10-8 issued July 21, 1949, if you like, sir, I will read it:

“Special Regulation 20-10-8, 21 July, 1949.”

In paragraphs 7 and 8, pages 7 and 8, subparagraph 12, entitled “Administrative Assistant”:

“With respect to the administrative assistant the inspector general should ascertain whether (a) the position has been specifically authorized, (b) he has proved himself qualified in the job specifications for this position, (c) additional duties interfere with his primary duties, (d) he works the required number of hours, (e) his federal pay is within the prescribed limits, (f) he shares his pay with others which is contrary to regulations.”

Then subparagraph 13 following that directly entitled “Caretaker.”

“With respect to the caretaker the matters [215] to be determined are the same as those required with respect to the administrative assistant.”

Are you generally familiar with those requirements and regulations as applicable to the inspector general?

A. Not generally, no. I am certain that if they

(Testimony of General Wilburn H. Stevens.)

found any irregularities it certainly would be in the inspector general's report. I am certain of that.

Q. Now, how often does the inspector general inspect the National Guard?

A. Each unit once each year unless the unit should be shown as unsatisfactory. Then it is given a six-month probationary period and reinspected by the inspector general. If it is not satisfactory at that time or better, federal recognition is withdrawn.

Q. With respect to inspection of the caretakers by the inspector general and the inspector general's reports, what happens to the written report prepared by the inspector general?

A. Well, the, the regular report is sent to the unit showing all of the discrepancies noted and commendations and so on, and so forth. The unit must endorse that back through my headquarters to the headquarters who sent out the inspector general giving their reasons why they were wrong or had failed to comply in certain places and [216] what they were going to do about it and how long it takes to correct the deficiencies. That is received in my headquarters and we further endorse it that we will see that they do the things they said they were going to, and mail it on forward to the inspector general's office.

Q. Now, does that inspection by the inspector general also include the inspection of the vehicles, trucks, trailers themselves?

A. That is right.

Q. Down to whether they are operating in

(Testimony of General Wilburn H. Stevens.)

proper condition? A. (Nods head.)

Q. Brake connections?

A. Well, there had been some doubt in my mind as to whether, unless this inspector general happened to be looking for that particular thing, as to whether he would take a special look at this thing, especially at a time when they were just changing over. He might or he might not.

Q. Well, all of these inspector general reports in any event come over, through your desk, do they not? A. That is right.

Q. Well, prior to this accident on March 11, 1953, have you ever been told by a representative of the inspector general's office, Department of the Army, or have you ever [217] seen any report made by the inspector general's department of the regular Army criticizing the units of the Washington State National Guard or your headquarters for your use of the unit caretaker?

A. We have never, we have never been, we have never had any difficulties that way.

Q. You have never received any criticism?

A. No, we haven't had any.

Q. Have you ever been advised orally or in writing by the inspector general's department regarding additional duties being performed by unit caretakers? A. Not to my knowledge.

Q. Well, if there were such an objection it would be brought to your knowledge, would it not?

A. It probably would be with the exception that I am gone sometimes and the assistant adjutant

(Testimony of General Wilburn H. Stevens.)

general handles affairs while I am gone. It is possible but I think hardly probable that such a thing occurred.

Q. Highly unlikely would be perhaps a way to phrase it. A. Unlikely.

Q. Well, now, I believe a little while ago before I started off at a tangent, we were talking about the advisory personnel both in your headquarters and in the units who were regular army personnel there in advisory [218] capacity, is that correct?

A. That is right.

Q. Now, do those advisory personnel, are they familiar with the duties of these caretakers?

A. Yes.

Q. Are they familiar with the duties of the people in Camp Murray issuing equipment?

A. Yes.

Q. Do they maintain a pretty close look at all of those functions? A. Yes, they do.

Q. Do you know of your own knowledge whether those advisory personnel, regular army personnel on and prior to March of 1953 knew that unit caretakers were coming to Camp Murray to pick up equipment? A. They did.

Q. Did you ever hear any objection either orally or in writing from any of those regular army supervisory personnel? A. None.

Q. Now, with reference to medical care and treatment for unit caretakers, what generally is it? Do the regulations provide in that regard?

A. Well, if he is near a federal installation he is taken care of there and in small towns like, we

(Testimony of General Wilburn H. Stevens.)

will say, [219] Wenatchee, Okanogan, places like that, there are certain doctors which are named to which he may go in case of injury or sickness.

Q. Is there a written directive that says that if the federal civilian personnel, these caretakers, are injured in the course of their duties as a caretaker at, say, Ellensburg, is there a list of doctors in Ellensburg to whom they will go?

A. That is right.

Q. And what will that doctor do with his bill?

A. It will be sent to the U. S. P. & F. O. for payment, who will process it.

Q. Now, let's assume that a National Guardsman in the course of his duties as a National Guardsman on drill time or, yes, when he is getting actual pay for drill time is in Ellensburg and he is injured, what happens to him?

A. He would be taken care of by any doctor that could be gotten as quickly as possible and would be sent to the nearest hospital if it were serious enough regardless of where it might be, and as soon as possible be transferred to Madigan Hospital.

Q. Would that National Guardsman in my latter example be going to the doctors who are on this list prescribed for caretakers?

A. Well, not necessarily. In a small town, it may [220] be the same one, but not necessarily. The whole thing is handled——

Q. Any doctor for the National Guardsman, is that correct?

A. That is right.

(Testimony of General Wilburn H. Stevens.)

Q. But the specific doctors on the list for the caretakers?

A. No, he wouldn't be required to go to those; any doctor.

Q. The National Guardsman wouldn't be required to go to those? A. That is right.

Q. Now, in Seattle, assuming that a unit caretaker were injured while in the course of his duties as a unit caretaker, where would he go?

A. Well, I believe the installation is the Marine Hospital named in that city.

Q. That is designated in some directive or regulation that comes down from Washington, D. C., isn't it? A. That is right.

Q. Now, sir, what is the status of property, let's say trucks, 2½-ton trucks that are in the possession of the Washington National Guard, under what circumstances are they there?

A. Well, the National Guard must be equipped the [221] same—must conform to the same Table of Organization, it may be reduced slightly, and the same Table of Equipment as the regular Army in the event of an emergency so that it fits right into the army organization.

Q. Is it a proper statement to say that equipment is loaned to the National Guard by the United States?

A. No. Yes and no, perhaps. To make that a little clearer I might say that the Congress appropriates money to the Department of the Army for the procurement of National Guard vehicles

(Testimony of General Wilburn H. Stevens.)

for the use of the National Guard. We are a little better off than the other reserve components in that this money is earmarked and must buy equipment for it. That is why we have it instead of their spending it in some fort instead of taking care of their reserves. And it is earmarked for the National Guard.

In the event of an emergency such as the Korean emergency, they withdrew about fifty per cent of the National Guard's equipment and used it in the army. They had to have it.

Q. When equipment in possession of the National Guard becomes obsolete or wears out, referring specifically to trucks and heavy equipment, where does it go?

A. Well, it is returned to the regular army. For instance, in the case of our trucks here they were turned in to Mt. Rainier Ordnance Depot. [222]

Q. That is the regular army depot, is it?

A. That is right.

Q. Well, now, regarding this question on trucks being turned in, are you familiar with regulations requiring the turn-in of World War II 2½-ton trucks some time in the last several years?

A. Yes.

Q. Well, up until say 1952—to shorten this a little bit—you had 2½-ton trucks with a low voltage electrical system, did you not?

A. Six volt, I believe.

Q. That might be. I think there is a little bit of

(Testimony of General Wilburn H. Stevens.)

confusion on the six-volt thing that Col. Hagen can clear up.

Mr. Casey: I might just say at this time, without attempting to testify, that we have talked in the pretrial order of, have referred to the old equipment as having six volts and the new equipment as having twelve. Now I am advised that what is meant by that is that when we say twelve now, we mean that these new vehicles have two twelve-volt batteries which are hooked up in series together, and I assume that that means a total of twenty-four volts. Now Col. Hagen can clear that up because he is the man right next to it and it may be that the former trucks were two sixes, making it twelve, although we are a little [223] indefinite on that until he gets here, but in any event the new truck is double what the old trucks were, whatever that might happen to be.

Q. (Continuing): Now, did you receive an order from the Department of the Army regarding the turn-in of the old 2½-ton trucks with the low voltage? A. We did.

Q. Now, the old 2½-ton trucks were the low voltage, they were used directly to haul when they were hauling trailers, to haul these trailers, were they not? A. They were.

Q. And were there brake connections between the old truck and the trailer? A. There was.

Q. Were those electrical brake connections?

A. They were.

Q. Did they have some type of conversion unit

(Testimony of General Wilburn H. Stevens.)

which permitted those electrical connections on the truck and trailer to be fastened together and operate together?

A. They were unnecessary conversion on the old trailer. The brakes on the trailer in the old system worked together without conversion.

Q. And under that braking system, would the driver in the cab of the truck apply the brake and would that brake affect equally the wheels on the truck and the trailer? [224]

A. So far as I know it did, yes.

Q. Do you know about what time the order was received requiring the turn-in of equipment, the 2½-ton trucks?

A. I don't remember, but it seems December of 1952 as near as I can guess.

The Clerk: Plaintiffs' Exhibit Number 24 has been marked for identification.

(Plaintiffs' Exhibit 24 marked for identification.)

Q. Sir, handing you Plaintiffs' Exhibit 24 for identification, which is a photostatic copy of what purports to be a Department of the Army and Air Force National Guard Bureau directive from Washington, D. C., dated 14 March, 1952, entitled "NG-ARLR 451, General Subject, Replacement of World War II Vehicles," I will ask you whether after you have examined it, whether that is the order that was received from the United States of America directing the turn-in of old World War

(Testimony of General Wilburn H. Stevens.)

II 2½-ton trucks? A. Yes, it is.

Q. And was that order received by you immediately after its issuance?

A. Well, I don't know exactly how soon it was received, but ordinarily within two weeks of the date.

Q. And upon receipt of that order from the United States of America, did you proceed to comply with it? [225] A. We did.

Q. Was there any change made at that time by the United States of America in the Table of Equipment for the units?

A. I don't know of the specific changes. There may have been some.

Q. Would it require a change of Table of Equipment to get a new truck from an old truck?

A. Well, not necessarily.

Q. Just be a turn-in of one and a picking up of the other, is that about it?

A. If there was any extra equipment that came with it, it would require a change.

Mr. Casey: We will offer Plaintiff's Exhibit 24.

Q. Sir, in the, upon the turning in——

The Court: Any objection?

Mr. Dovell: Your Honor, these exhibits were supposed to be available at the time of pretrial order to be examined, but I haven't any objection.

The Court: Very well, 24 is admitted.

(Plaintiffs' Exhibit 24 admitted in evidence.)

(Testimony of General Wilburn H. Stevens.)

Mr. Casey: I might say we didn't know about it ourselves at that time.

The Court: It is all right. It is all right, [226] go ahead.

Q. (Continuing): Sir, directing your attention to this paragraph in Plaintiffs' Exhibit 24, paragraph 3, which states:

"The 259 World War II trucks, 2½-ton cargo, presently on hand, will be utilized by units of your state for summer field training. Upon completion of summer field training and not later than 31 July, 1952, these trucks will be shipped to Mt. Rainier Ordnance Depot."

I will ask you whether that order was carried out by you?

A. To the best of my knowledge it was.

Q. Did you have any discretion in the carrying out of this order dated, which is Plaintiffs' Exhibit 24?

A. None whatsoever.

Q. I note that paragraph 6 of Plaintiffs' Exhibit 24 requires also the turning in of spare parts, tools, accessories, modification kits, equipment, winterization units to ordnance distribution depot. Was that carried out?

A. It was to the best of my knowledge.

Q. Well, then, what were these two, what replaced these 259 World War II 2½-ton trucks?

A. New trucks became, were being shipped to us later.

Q. Now, with the—strike that. Did the 259

(Testimony of General Wilburn H. Stevens.)

World War II [227] 2½-ton trucks referred to in Plaintiffs' Exhibit 24 comprise substantially all of the 2½-ton trucks you had of the old trucks?

A. All that remained. You see, we had given about fifty per cent of our trucks back to the army prior to that for use in the Korean situation and so far as I know that was, that constituted what remained in the Washington National Guard.

Q. March 14th you still had 259 old 2½-ton trucks and those you had to turn in by July 31, 1952? A. (Nods head.)

Q. Now, these 259 trucks we are talking about, they were the low voltage electrical system trucks, is that correct? A. That is right.

Q. Now, did you retain the old trailers that you had?

A. We had many of the old trailers and especially trailers of the type which carried detectors generally.

Q. In other words, the big four-wheel trailers, those were kept? A. Right.

Q. You were not ordered to turn those in, were you? A. No.

Q. Well, now, when you received—or did you start receiving the replacement 2½-ton trucks immediately after you [228] turned in the old ones?

A. I believe we received some before we got rid of all the old ones. As I remember it we received quite a goodly number before we turned in all the old trucks and the rest afterwards.

(Testimony of General Wilburn H. Stevens.)

Q. You were in the courtroom while Capt. Wubens was testifying this morning, were you?

A. Yes.

Q. Did you hear his testimony that during the active federal military service of the 770th at Hanford, prior to, I guess it ended in July of 1952, that prior to that time they had turned in some of the old 2½ tons with the low voltage and had received some of the new 2½ tons with the higher voltage?

A. Yes, that is true, but the army received the equipment ahead of us and he was in the regular service at that time.

Q. Oh, I see. Well, now, the——

The Court: Is that a good breaking point?

Mr. Casey: Any time.

The Court: I think we ought to have a little recess. We will have a little recess now of about ten, fifteen minutes, something of that kind.

(Whereupon at 10:40 o'clock a.m. a recess was had until 10:55 o'clock a.m. [229] at which time respective counsel being present, witness Stevens resumed the stand for continued direct examination by Mr. Casey, and the following proceedings were had, to wit.)

The Court: Ready to proceed? Go ahead.

Q. At the close of the session we were discussing this change-over equipment. Upon issue to the National Guard by the United States of the new 2½-ton trucks with the higher voltage, were you re-

(Testimony of General Wilburn H. Stevens.)

quired to use those trucks to perform your mission?

A. We were.

Q. Were you ordered to use those trucks by the United States in the performance of your mission?

A. Well, there was not a specific order but we are required under the law to train these troops the same as they are trained in the regular service and to use the same equipment, so under that, with that particular understanding, we were ordered to do so.

Q. Now, was it necessary that the four-wheel trailer be pulled by the 2½-ton truck to perform the mission of the unit? A. It was.

Q. At the time you were issued the new 2½-ton trucks, did they have any conversion units which would permit them being used with the four-wheel trailers so the four-wheel [230] trailers would have brakes? A. They were not available.

Q. When were these—and we will call them conversion units—when were these conversion units made available?

A. I can't answer that because I don't know, but it was quite some time later after we had received the new trucks and had been using them for some time.

Q. Well, sir, to refresh your recollection, I will hand you Department of the Army and Air Force National Guard Bureau bulletin, dated 10 February, 1954, Volume 5, No. 8, and direct your attention to page 5 of that bulletin in Section 5 and it is paragraph 8 in the middle of the page, and ask

(Testimony of General Wilburn H. Stevens.)

you if that refreshes your recollection as to when these conversion units for the new 21½-ton trucks were made available to the National Guard by the United States. Well, it states that:

“The following kits are now available upon requisition at the appropriate distribution depot.”

And goes ahead and lists the kits, the new conversion kits for 21½'s to use with the old trailer.

A. They were, however, the actual receipt of these was some time after, quite some time after the date of this particular directive.

Q. That directive was what again? [231]

A. 10 February, 1954.

Q. Well, now, from the time of your receipt of the new 21½-ton trucks until some time in 1954, did the 21½-ton trucks with the higher voltage operate with the old four-wheel trailers without any brake connection between the two? A. They did.

Q. Was that useage required in order to perform your mission? A. It was.

Q. Would those conversion units come under the classification of automatic type issue?

A. They would.

Q. During——

A. However, excuse me. This says here that they are available upon requisition so I presume that Col. Hagen, the USPFO, did requisition the kits.

Q. But it would be after February, 1954, the date of that directive?

(Testimony of General Wilburn H. Stevens.)

A. Yes, it would be; it would be.

Q. Sir, do you know of your own knowledge whether the United States of America, the regular army, was, during this period, say, from the middle of 1952 until some time in 1954, operating new 2½-ton trucks with the old trailers with no possible brake connections between the two? [232]

A. I am satisfied that there was a period in which they did so although they would receive these kits before the National Guard would, in all probabilities.

Q. Was it required in the performance of your mission that the 2½-ton trucks pull these four-wheel trailers on the public highways of the State of Washington?

A. That is right; there is no other way of transporting a trailer from one place to the other.

Q. And on March 11, 1953, the date of this accident, was it required that the four-wheel trailer be pulled by a new 2½-ton truck? A. It was.

Q. And was it on that date required in order to perform the mission that the old 2½-ton truck be pulled—strike that. Was it required on the date of the accident that the old four-wheel trailer be pulled by the new 2½-ton truck without any brakes between the two?

A. We deemed it so because the training of that unit depended on their having this director.

Q. Wasn't it true there wasn't any other way to pull the trailer? A. None that I know of.

Q. The new trucks were automatic issue to the

(Testimony of General Wilburn H. Stevens.)

unit, were they not? A. They were. [233]

Q. And the trailers were always an automatic issue to the unit, were they not?

A. Yes, we had them for quite some time.

Q. They were part of the Table of Equipment materiel for the unit? A. Right.

Q. Sir, are National Guardsmen under your command covered by the State of Washington Workmen's Compensation Act?

A. Not as National Guardsmen.

Q. Do National Guardsmen take the federal loyalty oath in the same form that the members of the Army of the United States do?

A. They do.

Q. Well, who at Camp Murray is in charge of determining whether equipment being released by Camp Murray to the various units is in safe condition for travel on the highway?

A. Well, I presume it possibly could come all the way back to me, but Col. Hagen, the U. S. P. & F. O., is the man who determines as a rule.

Q. Well, now, prior to March 11th of 1953, had you made attempts to obtain the electrical conversion equipment between the new trucks and the old trailers?

A. That was handled by Col. Hagen and I am certain [234] that he did make every effort to get these and, if my memory serves me, there was considerable arguing back and forth as to what we were to do and finally the decision was that we would have to use the equipment without the kit.

(Testimony of General Wilburn H. Stevens.)

Q. You couldn't perform your mission without using it, wasn't that the reason?

A. That is right.

Q. And you couldn't get it because the army didn't give it to you, isn't that right?

A. That is right.

Q. Sir, on March 11, 1953, who was the employer of Sergeant Brown of Battery C of the 770th?

A. Well, the direct employer was the battery commander, of course, but the authority came all the way down from Secretary of the Army through my headquarters.

Q. And did all the authority relevant to his hiring, firing, working hours, parallel to civilian service benefits, leave and sick leave come down from the Secretary of the Army?

A. It does.

Q. And it did on that date, isn't that true?

A. It did.

Mr. Dovell: I object to that on the ground it is a conclusion and the legal opinion of this [235] witness.

The Court: Well, I think there may well be some merit in that. Those questions involve mixed questions of fact and law. However, I will leave the answer stand for such value as it may have. Of course the opinion of the witness as to a legal matter would not be admissible. On the other hand, the source of authority by which Brown was employed, supervised in his employment, might be considered a question of fact and, therefore, subject of testimony by this witness who is, of course,

(Testimony of General Wilburn H. Stevens.)

highly competent to testify on the subject if it is a subject for testimony. Accordingly, I will allow the answer to stand. Overrule the objection.

Q. Sir, does the State of Washington provide insurance, liability insurance, for vehicles operated by the State of Washington? A. It does.

Q. On March 11, 1953, did the State of Washington provide insurance for, that is, liability insurance, on the 2½-ton truck that was operated by Brown in this accident? A. No.

Q. Sir, handing you Government Exhibit 1—
The Court: A-1.

Q. (Continuing): Sir, handing you Defendant United States of America's Exhibit A-1, being photostatic copies of letter from D. K. MacDonald & Co., insurance brokers, and [236] policies with General Insurance Company of America and with particular reference to page 4 of that exhibit, I will ask you with reference to the National Guard on March 11, 1953, what, if any, vehicles were covered by public liability and property damage insurance by the State of Washington?

A. The vehicles that were purchased from the state funds were covered and certain trucks issued by the United States Government to the National Guard, but which were used for strictly state purposes were covered in that insurance.

Q. Can you describe from that exhibit what those vehicles were and how many of them were what—

The Court: Isn't the amount in the exhibit?

(Testimony of General Wilburn H. Stevens.)

Mr. Casey: Only by number of vehicles, your Honor.

The Court: Go ahead, all right, just——

Mr. Dovell: I am going to object to interpretation of this policy because there is a legal question here of what cars or automobiles are covered by this policy. One contention may be that all property is covered. Another contention may be that just state-owned, but that is an interpretation of the policy and the policy speaks for itself.

The Court: Right at the moment the question that is being presented at this moment is to describe certain [237] vehicles enumerated in the exhibit. I think that is the question.

Mr. Casey: That is the question, your Honor.

The Court: Well, if the witness knows the answer to that he may give it, describe certain vehicles.

A. Five-passenger automobiles or sedans which are used by people who are paid from state funds in their travel throughout the State of Washington in the supervision of the National Guard.

Q. That wouldn't include unit caretakers, would it?

A. No. Six trucks. Now we use certain, the Federal Government allows the state to strictly use certain trucks for the use on the reservation, we will say, and for our big installations like, for instance, one of these trucks is used by our custodian of the armory in Seattle for the purpose of hauling garbage and ashes and such things as that. I can't

(Testimony of General Wilburn H. Stevens.)

tell you exactly what each of these six trucks were. One of them is a panel truck purchased by the state which is used by our maintenance crew. Another truck is a state purchase truck, a dump truck which we use in hauling, filling our various installations in the state. Two others are pick-up trucks purchased by the state. Now we go down to the number it shows, one trailer-type unit, and that is the big trailer, to the best of my knowledge, the big trailer which we use to, for hauling [238] extremely heavy stuff like boilers and very heavy equipment which we have to transport over the roads, for instance, bulldozers. In some cases we would haul even our road grader on them.

Q. Sir, are the trucks listed in there, do they bear Washington State license plates?

A. They do.

Q. All the trucks covered under that policy bear Washington State license plates?

A. They do.

Q. Do any of the trucks and trailers in the units, Battery C, for example, of the 770th, bear Washington State license plates? A. No.

Q. As a matter of fact, one of the vehicles on this, in that list you have there is used by the state painter, isn't it? A. That is right.

The Court: Now, this exhibit has been referred to but not yet admitted in evidence.

Mr. Casey: Well, if your Honor please, I believe that was admitted into evidence as the De-

(Testimony of General Wilburn H. Stevens.)

fendant United States of America Exhibit 1-A in the pretrial order.

The Court: All right, fine; thank you.

Mr. Casey: I have no further questions. [239]

The Court: Cross-examine, Mr. Dovell.

Cross-Examination

By Mr. Dovell:

Q. General, are you a state officer or a federal officer? A. I hold a dual status.

Q. What active status do you hold?

A. I am a federally recognized Brigadier General in——

Q. I mean, in your capacity as adjutant general, are you an officer of the state?

A. I received my appointment from the Governor. I am a regular National Guardsman who have been called to full-time duty by orders of the Governor.

Q. Then you are acting under the Governor of the State of Washington?

A. To a certain extent.

Q. To the extent of your employment?

A. No; I must carry out the orders of the Governor and at the same time the rules and regulations which are handed down to me by the Department of the Army.

Q. In carrying out those rules and regulations handed down by the Department of the Army, are you compelled to carry out those directives or advisory orders?

(Testimony of General Wilburn H. Stevens.)

A. I have some leeway, but in general I must carry [240] them out.

Q. Now, if you did not carry them out, what would happen? Would you be court martialed by the army?

A. No, no; they would withdraw. If I did not carry out the rules and regulations they would take up the matter with the Governor and if it continued they would withdraw the federal recognition of the units of the Washington National Guard.

Q. Isn't that the only penalty that would be suffered if orders or directives or suggestions from the Department of the Army were not carried out?

Mr. Casey: I object to the use of the term "suggestions," if your Honor please.

Mr. Dovell: The counsel have used the word "directive" and I have to do something to offset the argument that the General here is acting directly as a commanding general for the army.

The Court: Yes. Well, repeat the question. I think it may be answered. General Stevens is an alert witness and I am sure he will follow closely the question put.

(Whereupon, the question was repeated.)

The Court: You may answer.

A. The Department of the Army could ask the Governor for my dismissal. [241]

Q. But the Governor would decide upon that?

A. The Governor would make the decision.

Q. That is within the state authority?

(Testimony of General Wilburn H. Stevens.)

A. That is right.

Q. Otherwise if the Governor didn't, why, the penalty that might be suffered would be that the Guard would not be recognized further than as a State Guard?

A. That is right; they would withdraw, they could withdraw my federal recognition, also. They could withdraw the money and equipment from the State of Washington.

Q. You recall, General, that during the war there was a number of us that served in the State Guard without federal recognition?

A. Yes, sir.

Q. And that was in lieu of the Guard that already had been called into service?

A. Yes, sir.

The Court: Into federal service, you mean?

Mr. Dovell: Yes, in federal service.

Q. In regard to this equipment that is furnished automatically or otherwise by the army, that also comes by way of aiding in the training of the units of the Guard?

A. Under the law the army prescribes the training for the National Guard and the equipment.

Q. When you say under the law, you mean that the army [242] sets up standards?

A. That is right, sir.

Q. For them to qualify as to whether they'd be federally recognized?

A. That is right, and whether they retain federal recognition.

(Testimony of General Wilburn H. Stevens.)

Q. And if they do not comply with those standards, then they lost that federal recognition?

A. Yes, sir.

Q. Is that correct? But they do not and they are not compelled by any law under the sun to obtain federal recognition?

A. Well, the National Guard is now listed as the first line of defense and as such they are given very definite responsibilities. All of my troops in the Washington National Guard have already been assigned many day missions and the orders are written and everything exactly what they do. There is an agreement between the state and the federal government in regards to National Guard.

Q. But at the same time there is no order that compels the State Guard to be federally recognized or get out of existence?

The Court: We know that to be a fact and whether the witness says so or not, is that not so? I mean, it is [243] a matter of law, isn't it?

Mr. Dovell: True, it is a matter of law.

Mr. Casey: Yes.

Q. (Continuing): So that when equipment comes to you or to the Guard and whether you use it or not is a matter in your hands?

A. We have to use it or go out of business.

The Court: Go out of business to the extent of not getting federal recognition, isn't that what you mean, General?

The Witness: That is right, or federal money.

The Court: Yes, but there wouldn't be anything

(Testimony of General Wilburn H. Stevens.)

to prevent some state if it desired to equip its National Guardsmen with muskets or flintlocks or any other thing if it saw fit? The state could do that if they saw fit to do it, couldn't they?

The Witness: Yes, sir, we have a hundred million dollars worth of equipment at the present time.

The Court: The point of the thing being that in order to procure federal aid through recognition certain standards of training, use of equipment and so on must be complied with?

The Witness: Yes, sir, that is correct.

The Court: But if some particular state, Texas, for example, decided that it didn't want to go along with [244] that program, it could do so, couldn't it?

The Witness: Yes, sir, Texas is the logical state, sir.

The Court: It is a very good choice of an example, I thought.

Q. So, after all, it is the idea of being supplied federal funds that is persuasive to the fact that if you want to continue to be financed you have to gain the recognition of the federal authorities?

A. That is correct.

Q. And it is the same way with the caretaker, the caretaker of the state property or the Guard property, you have to have a caretaker, otherwise you do not get federal recognition?

A. Well, the Federal Government is concerned about its equipment. It wants some one to look after it. I presume whether it was in the hands of the National Guard or where it was, that someone

(Testimony of General Wilburn H. Stevens.)

would be caretaker looking after it and paid from federal funds.

Q. They want that office designated for the purpose of looking after it in the way of mechanical repair and the other duties assigned to that position, is that correct?

A. The caretaker does only minor mechanical repairs. He does, as I said before, what we term first echelon maintenance, about what the average owner does for his own [245] car. He keeps an eye on the water and the radiator and battery and tires and that sort of thing and sees that it is not abused. A great deal more of his time is spent on taking care of rifles, machine guns, blankets, canteens and all of the items of equipment. Then comes the paper work which requires practically half of his time.

Q. That paper work is papers in connection with the Guard? A. Yes.

Mr. Dovell: I think that is all.

The Court: Well, of course, as far as the requirement of having a unit caretaker is concerned, there is really not any distinction between the requirement of having other personnel required by the Table of Organization in order to qualify for federal recognition, is there, General?

The Witness: No, sir.

The Court: In other words, the unit caretaker is one of a considerable number of persons serving in various capacities that the National Guard unit must have in order to qualify for the federal rec-

(Testimony of General Wilburn H. Stevens.)

ognition and the federal funds and supplies and money and so on?

The Witness: Yes, sir.

The Court: So that his status as an employee of the State is no different than that of any other one of the considerable number of persons required to serve in a National [246] Guard Unit if it is going to conform to the standards required for federal recognition, is there?

The Witness: He has to be a member of the National Guard in order to be a unit caretaker.

The Court: There is no distinction in his status though as far as employment is concerned than any other of the persons required by the National Guard unit, is there?

The Witness: No, sir, I wouldn't say so.

The Court: That is all. Do you have anything?

Mr. Rupp: I have no questions.

The Court: Very well.

Mr. Casey: I——

The Court: Did you have something?

Mr. Casey: I have several.

Redirect Examination

By Mr. Casey:

Q. From whom, General, do you obtain your authority to hire the sixty-five or so civilian employees of the National Guard to which you made reference in your earlier testimony?

A. From the Governor of the state.

(Testimony of General Wilburn H. Stevens.)

Q. From whom is your authority derived in the hiring of unit caretakers? [247]

A. Well, it would come from the Secretary of the Army down through the National Guard Bureau to us.

Q. And that is in accordance with the regulations that have been referred to during the course of your testimony, is that right?

A. Right. [248]

* * *

LT. COL. ALBERT G. HAGEN

having been previously sworn on oath, was recalled as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination

(Continued)

By Mr. Casey:

Q. Will you state your full name, please?

A. Albert G. Hagen.

Q. What is your address, sir?

A. Business or residential?

Q. Your business address.

A. Camp Murray, Fort Lewis, Washington.

Q. Are you a member of the Army of the United States, sir? A. Yes, sir.

Q. Where are you detailed to duty?

A. Camp Murray, Fort Lewis, Washington.

Q. What is your rank? A. Colonel.

Q. What is your army serial number?

(Testimony of Lt. Col. Albert G. Hagen.)

A. 0910503.

Q. What is your branch of service?

A. Ordnance Corps.

Q. What insignia are you presently wearing?

A. Insignia of the National Guard Bureau. [466]

Q. What is the significance of that fact?

A. Well, I am detailed to duty to the Special Staff of the United States with duty with the National Guard Bureau which is a Special Staff Section of the Department of the Army.

Q. National Guard Bureau being in Washington? A. Washington, D. C., that is correct.

Q. If you were on duty as a colonel in the National Guard of the State of Washington, what insignia would you now be wearing?

A. I'd be wearing insignia of the Ordnance Corps.

The Court: When you are on active service in the Army of the United States and assigned to this particular duty?

The Witness: That is correct.

The Court: Yes.

Q. What are your present duties?

A. My present duties are, title is United States Property and Fiscal Officer. Those duties include, number 1, an accountable officer for all property issued to the Washington National Guard, federal property, that is. I handle all the supply functions. I account for and handle all fiscal matter, payrolls, purchasing and contracting. I am purchasing and

(Testimony of Lt. Col. Albert G. Hagen.)

contracting officer. I am a transportation [467] officer.

Q. Are you also in charge of the, what used to be known as the unit caretakers and what is now called the administrative, supply and maintenance technicians?

A. I have the funds for them and I pay them. I certify their payrolls for payment by the Finance Office. They are hired and fired by the discretion of the Adjutant General. However, the funds for their payment is administered by me.

Q. While hiring and firing is in accordance with a federal law the Secretary of the Army delegates that function to the Adjutant General, isn't that correct?

A. That is my interpretation, yes, sir.

Q. Well, what contact do you have—strike that. Is the position that you now hold, was that formerly known as the United States Property and Disbursing Officer? A. That is correct.

Q. Commonly known as U. S. P. & D. O.?

A. To clarify that position, prior to July of 1954 it was known as the Acting United States Property and Disbursing Officer and by a law passed in 1954 it is known now as United States Property and Fiscal Officer. They have removed the "Acting" and substituted the word "Fiscal."

Q. What were your duties and position on March 11, 1953, sir?

A. I was then the Acting United States [468] Property and Disbursing Officer.

(Testimony of Lt. Col. Albert G. Hagen.)

Q. What was the procedure by which materiel was placed in the hands of batteries and battalions of the National Guard at that time?

A. The procedure would be that equipment was authorized them by the appropriate T. O. & E. When it became available to the State of Washington through being shipped to my property account, well, then, the unit for which this equipment was designated would be so advised and be ordered to come in and pick it up upon submission of the proper documents. In other words, initial slip.

Q. Who makes up the T. O. & E. for a National Guard unit?

A. T. O. & E. is based on the regular Army T. O. & E.'s.

Q. Made up by the Department of the Army?

A. That is right, the National Guard operates under the T. O. & E. of the regular army with reduction factor applied.

Q. Who designates who gets the particular equipment that comes down, federal equipment that comes through your hands?

A. I'd like to ask for a little clarification on that, Mr. Casey.

Q. Well, in your previous answer you indicated somewhat to the effect that property came down designated for a unit, I assume a battery or a battalion. Who made that designation? [469]

A. Well, the T. O. & E. would designate that. In other words, some equipment is found in all T. O. & E.'s and other equipment is only found in

(Testimony of Lt. Col. Albert G. Hagen.)

specific T. O. & E.'s, and based on the fact that is how a unit would be assigned certain equipment. They must be authorized it to be assigned it.

Q. Well, the unit is authorized certain equipment by the T. O. & E.? A. That is correct.

Q. The T. O. & E. is prepared by the Department of the Army? A. That is right.

Q. And the Department of the Army sends equipment to you for use by this particular unit?

A. I might amplify this a little bit. We have as an example, we might have a thousand pieces of equipment of a specific type issued or authorized in the state based on these T. O. & E.'s and we may only get fifty per cent of that. Then we will apply at discretion, at our discretion on the state level as to where this fifty per cent will go. In other words, we may not retain a straight fifty per cent factor through all units. However, it is very rarely that we would get the full authorization of equipment that is authorized by the total number of T. O. & E.'s in the state.

Q. As of March, 1953, what were the basic duties of the administrative, supply and maintenance technician? [470]

A. Well, the basic duties of those personnel were number 1, the accounting for, caring of, receipt of, maintenance of, equipment issued to his unit or organization and administrative duties pertinent thereto.

Q. What was meant by the term "receipt of equipment"?

(Testimony of Lt. Col. Albert G. Hagen.)

A. Well, my interpretation of receipt of equipment——

Mr. Dovell: I am going to object to this answer, your Honor, and question because it calls for a conclusion of the witness and the regulations have to speak for themselves. The interpretation or construction by any member would not be binding on the government.

The Court: Well, I think that is probably true in a certain sense. On the other hand, the practice that is followed with respect of issuing equipment and so on certainly that would be admissible, and another point about this is that I think we have covered this about three times now from three different witnesses that have covered the same point. I think so.

Mr. Casey: Well, your Honor is probably right and I am aware of it. My only feeling was that we are in sort of a never, never, inbetween ground here with General Stevens as——

The Court: The thing about it is it seems to me if you could ask Col. Hagen what the practice is that they follow [471] with respect of issuing equipment, why that would be admissible in any case. Let's do it that way without asking him to give any interpretation of a regulation.

Mr. Casey: Of course the point I am trying to get at is not a question of custom within this particular state National Guard but the, whether this is considered by this officer who is a representative of the United States of America as part of the basic duty of a unit caretaker as opposed to what

(Testimony of Lt. Col. Albert G. Hagen.)

might be some additional duty that could be given him by the state National Guard.

The Court: Well, I want to make a full record on it and I don't want to preclude you, so if there is any conceivable phase of it that hasn't been covered, why go ahead and I will overrule the objection. We will hear it so we will have the full matter before us.

Mr. Casey: This comes from a United States Army officer whereas the other men were National Guard officers.

The Court: I recognize there is that distinction about it, go ahead.

A. (Continuing): Would you repeat the question?

The Court: The question was, what is this term "receipt" as used in, designating the duties of the unit materiel officer, what does that mean?

A. (Continuing): Equipment is receipted for at Camp Murray by the unit caretaker or the company commander [472] or his designated representative.

Q. Is the unit caretaker the designated representative?

A. In practically ninety-nine per cent of the cases, yes, sir. In other words, these representatives for property responsibility who are delegated by us have a signature card which we have on file and only those persons are allowed to sign for property.

Q. Do you consider the picking up of equipment at Camp Murray by the caretaker part of his basic primary duties?

A. I do, sir.

(Testimony of Lt. Col. Albert G. Hagen.)

Q. Do the unit caretakers ordinarily come to Camp Murray in a group?

A. That is the practice that is followed in cases where issues of large amounts of equipment at one time are contemplated.

Q. As a matter of fact, isn't the equipment going down to the battalion for use in the batteries?

A. Equipment is not issued on a battalion basis. It is issued to the companies or batteries individually. However, it is used for the battalion's training.

Q. And the caretakers of the battalion work together in getting that equipment down to the units, the companies and the battalions?

A. That is the common practice, yes, sir. [473]

Q. Well, now, sir, with reference to the old 2½-ton trucks and the new 2½-ton trucks, do you have a—was there a directive requiring the turn-in of the old voltage 2½-ton trucks?

A. There was a letter, I don't recall the exact date, but it was in 1952 directing the turn-in of what was known as World War II type vehicles of which was included the old type 2½-ton truck.

Q. Handing you Plaintiffs' Exhibit 24, will you state whether that is the directive?

A. Yes, sir, that is.

Q. And did that, and did you turn in or did the National Guard return the 259 I believe it is listed, on their old type 2½-ton trucks in accordance with that directive?

A. They did.

(Testimony of Lt. Col. Albert G. Hagen.)

Q. Were they required to do so in accordance with the terms of that directive?

A. Yes, sir, we were ordered they would be turned in no later than 31 July, 1952, which was done.

Q. There is reference on page 2 of that directive towards the end of it a turn-in of some additional equipment, I believe, and I think it talks about some conversion units. Will you explain what that was, what it means?

A. It doesn't mention the word "conversion." I [474] might read it. It is just a short paragraph and explain it, the paragraph 6. "Spare parts, tools, accessories, 12-volt modification kits, OVM equipment and winterization kits will be returned to the Ordnance Distribution Depot serving your state in accordance with 1-C above." I assume your question is with respect of 12-volt modification kit?

Q. It is.

A. The 12-volt modification kits did not apply to 2½-ton trucks. This letter applies to ¼-ton and ¾-ton trucks as well and certain of the ¼- and ¾-ton trucks did have a 12-volt modification kit applied for use with special purchase type signal equipment and radios.

Q. So that particular paragraph is not concerned with——

A. No basis, not as far as the 12-volt modification kits are concerned, no, sir.

Q. Now, we have gone over this before so I will be very brief with it, but what was the voltage in

(Testimony of Lt. Col. Albert G. Hagen.)

the old 21½'s? A. Six volt.

Q. Were new 21½-ton trucks subsequently issued by the Department of the Army?

A. Yes.

Q. When did that issue start coming in?

A. They started to come in in the fall of 1952, the [475] exact date, I cannot remember.

Q. What was their voltage?

A. They were 24 volts.

Q. Now we have had talk about these new 21½'s being 12 volts and I think possibly there is a little bit of misunderstanding in all our minds about it. I wonder if you could clear that up for us?

A. I think the misunderstanding is due to the fact that they have two 12-volt batteries but operate on a 24-volt system.

Q. So that the two 12-volt batteries are connected in series, would you call that?

A. That is correct.

Q. And under the old, the old 21½'s with the four-wheel trailers, were those connected by an electrical brake connection?

A. Those 21½-ton trucks which were used had two. Any equipment which had was equipped with electrical brakes had a 6-volt electric brake system.

Q. And the four-wheel trailer likewise had a 6-volt brake system? A. That is correct.

Q. Well, now, did you turn in or were you required to turn in the four-wheel trailers that had the 6-volt electrical systems [476]

A. No, sir; those vehicles are still the authorized

(Testimony of Lt. Col. Albert G. Hagen.)

vehicle for that particular purpose and use by the army.

Q. And were you on March 11th required to use those four-wheel, 6-volt trailers? A. Yes, sir.

Q. After issuance of the new trucks, were you required to pull the four-wheel 6-volt trailers with the 24-volt 2½-ton trucks?

A. If they were to be moved, they had to be towed by a 24-volt vehicle.

Q. And was it necessary in performance and mission of the National Guard that the four-wheel 6-volt trailers be moved? A. Yes, sir.

Q. Referring to Battery C of the 770th, was it necessary on March 11, 1953, that that—or strike that. Referring to the 770th Battalion, was it necessary that the four-wheel 6-volt trailer be pulled by a 2½-ton truck that was of 24 voltage?

A. Yes, it was in this respect, that if the state status of training require that they have that equipment at their home station it would have to be towed by that type of equipment.

Q. Well, did the status of training require that that four-wheel trailer with its equipment and the 2½-ton truck [477] be in the 770th Battalion?

A. That is a question that I am not qualified to answer.

Q. Did you know on March 11th, before this accident, 1953, and prior to that, that there was no brake connection between the four-wheel trailers and the 24-volt 2½-ton trucks? A. Yes, sir.

Q. Did you believe it was necessary for the

(Testimony of Lt. Col. Albert G. Hagen.)

performance of the National Guard's mission to have those units, the trailer and the new truck, hooked up together and being pulled down the highway?

A. It was necessary to fulfill their training mission, in my opinion.

Q. You say you started to get these 24-volt 2½-ton trucks in in the fall of 1953, is that right?

A. Fall of 1952.

Q. Excuse me, fall of 1952. Did you know as you were receiving these new 2½'s that they had no means of being hooked to these trailers for brakes?

A. Yes, sir.

Q. Did you do anything about it?

A. Yes, sir.

Q. What did you do?

A. We attempted to find out an available conversion [478] kit or parts that could be used to, that would be available by the Chief of Ordnance who was the designer and supplier of the vehicles.

Q. Chief of Ordnance, that is the United States Government?

A. That is correct; to determine if any such kits were available and we were informed that they were not available and we could not procure them at that time.

Q. Did you receive any such order in writing?

A. We subsequently received such an order from the National Guard Bureau.

Q. Do you have that order with you?

A. I do.

(Testimony of Lt. Col. Albert G. Hagen.)

Q. Will you produce it, please?

A. This is——

Q. I think we will mark it and then you can read it, sir. It might be easier to follow.

A. I will have to have that copy back but I think there has been an extract made.

Q. Well, if there has—— A. I am sure.

The Court: You can substitute a photostat at a later time, go ahead.

The Clerk: Plaintiffs' Exhibit 36 has been marked for identification. [479]

(Plaintiffs' Exhibit 36 marked for identification.)

Q. Sir, handing you what has been marked Plaintiffs' Exhibit 36 for identification, will you state what it is and advise us?

A. The Army Division Logistics Letter issued by the Department of the Army and the Air Force National Guard Bureau under date of 31 January, 1953.

Q. Is that an order that is made out by that Bureau and forwarded down to your level?

A. Well, I might read the first paragraph, certain portion of this which may answer your question:

“Army Division Logistics Letters will contain only items of an informative or interim nature which will in many cases be published at later dates in permanent publications such as regulations, modification work orders, etc.”

(Testimony of Lt. Col. Albert G. Hagen.)

Does that answer your question?

Q. Yes, it does.

Mr. Casey: We will offer Plaintiffs' 36 in evidence.

The Court: Any objection?

Mr. Dovell: I object to it because I don't think it is relevant, your Honor.

The Court: Well, can't tell that until I see the [480] content of it and what the Colonel refers to——

Mr. Casey: I will ask him.

The Court: Are there any other objections other than its relevancy?

Mr. Dovell: I haven't read it. Just what he read was all that I could go by.

The Court: Take a look at it.

The Witness: I only read one section of it, sir.

The Court: Let the Colonel refer to the part that is pertinent and then we will pass on the motion to strike it.

Mr. Casey: Fine, sir.

The Court: That will be quicker. In a non-jury trial the Court undoubtedly will hear a lot of things he has to exclude at a later time.

Q. Will you refer to the pertinent part, Plaintiffs' Exhibit 36 for identification, and tell us what it says?

A. Section 2, under Maintenance, paragraph 1:

“Conversion kits, twenty-four, six-volt, will not be requisitioned by the states until further notice. The Bureau will furnish full information for the

(Testimony of Lt. Col. Albert G. Hagen.)

requisitioning of the above kits when notified by ordnance that these kits are available for issue from depot stocks.”

That is all that is pertinent. [481]

The Court: Now——

Mr. Dovell: I think that is in the stipulation, your Honor.

The Court: It may be, but is there any further occasion to object?

Mr. Dovell: If that is all that is requested to be admitted, I admit that.

The Court: Very well, the exhibit is admitted and you can withdraw the original, Colonel, and provide for a photostat of it or some other form of a copy that is agreeable to counsel.

Mr. Casey: Yes, sir.

(Plaintiffs' Exhibit 36 admitted in evidence.)

Q. Now, in that reference to which you have just read, what is meant by the 6 volt, what are they talking about?

A. Well, it referred to a conversion kit, 24 to 6 volt, which means a kit whereby the voltage from a 24-volt vehicle can be converted to 6 volts that can be applied to the braking system of the towed vehicle.

Q. In other words, if that particular kit were used on the 2½-ton truck that was involved in this accident and the four-wheel trailer that was involved in this accident, does that mean that the trailer would have been [482] equipped with brakes

(Testimony of Lt. Col. Albert G. Hagen.)

that could have been operated from the cab of the truck?

A. That is correct.

Q. What was the date again of that order?

A. It was 31 January, 1953.

Q. Prior to that time had you attempted to get in such conversion equipment from the United States Government through their Ordnance Depot at the so-called Rainier Ordnance Depot of the Government?

A. That was one of our channels. We had contacted the National Guard Bureau also and every place we contacted and asked other departments of the army agencies about the availability and we met with negative results everywhere.

Q. Do you know of your own knowledge whether the Inspector General's Department of the Army of the United States was familiar with the functions of the caretakers in this state insofar as their picking up and receipting for equipment at Camp Murray?

A. I am sure they are familiar with that procedure.

Q. I believe that regulations provide that the Inspector General's Department after inspecting the National Guard will consult with you with reference to irregularities?

A. That is correct.

Q. Has the General Inspector's Office ever advised you of any irregularities in connection with the duties of [483] the caretakers insofar as this thing, I should qualify, insofar as picking up equipment at Camp Murray is concerned?

(Testimony of Lt. Col. Albert G. Hagen.)

A. No, sir.

Q. Do you know of your own knowledge whether prior to March 11, 1953, the United States Army was operating equipment, new 2½-ton trucks with 24-volt systems pulling four-wheel trailers with 6-volt systems?

A. I can only assume that they were because there was no equipment available to convert.

Q. Was it possible on March 11, 1953, to pull these four-wheel trailers with anything smaller than a 2½-ton truck?

A. Not this type of trailer, no, sir. The trailer is too heavy to be towed by anything smaller available to the National Guard.

Q. When did you finally get these conversion units from 24 to 6?

A. First availability on these conversion units, we were informed of the availability on 10 February, 1954.

Mr. Casey: I have no further questions.

The Court: Cross-examine?

Cross-Examination

By Mr. Dovell:

Q. Colonel, would you explain in what capacity you [484] act in connection with National Guard with the Adjutant General?

A. Well, I am detailed to duty as I previously outlined as the Property and Fiscal Officer. I have an additional responsibility of acting as his advisor

(Testimony of Lt. Col. Albert G. Hagen.)

in logistical matters and as a staff officer on his staff. Does that answer your question, sir?

Q. Well, in that connection who would be responsible for placing materiel on the Washington highway?

A. Well, I'd like a little clarification of the question, Mr. Dovell.

Q. I think that yesterday the General said that you were responsible for placing trailers and trucks on the highway for the National Guard. I didn't understand that you were running the National Guard, so I am asking you.

A. Any order that is issued out of my office to any National Guard personnel is issued in the name of the Adjutant General.

Q. If the Adjutant General didn't care to observe what suggestion or direction you requested would he have to do so?

A. No, he can overrule me with very little trouble.

Q. That would involve in his being responsible for his own job? [485]

A. I would say so, yes.

Q. In other words the responsibility is his of running the Guard, placing the equipment on the highway?

A. Well, it is my understanding that anything in connection with the operation of the Guard in the State of Washington is the responsibility of the Adjutant General as far as the operation of the National Guard is concerned.

(Testimony of Lt. Col. Albert G. Hagen.)

Q. And what is his capacity as you understand?

A. My understanding is that he is an appointed state official on the state status.

Mr. Dovell: That is all.

Cross-Examination

By Mr. Rupp:

Q. Colonel, we have been hearing a good deal about 2½-ton trucks and 24-volt electrical systems and four-wheel trailers and 6-volt electrical systems. The fact that they wouldn't be hitched, that the braking systems couldn't be hitched up, didn't you think that was dangerous?

A. You are asking for a personal opinion now?

Q. Sure.

A. My personal opinion under normal operating conditions, normal precautions, I don't believe so.

Q. That is why they were permitted, is that right? [486]

A. I refuse to answer that question.

Q. You don't know?

A. No, I don't know if that is why they were permitted, but I personally don't think it was dangerous because it had been done so much before and no undue——

Mr. Casey: I will object to what may have happened.

The Court: Well, it is late in the game now. We have gotten a long ways into matters of opinion that weren't probably proper to begin with. I

(Testimony of Lt. Col. Albert G. Hagen.)

think this subject has been fully covered, though, hasn't it?

Mr. Rupp: Yes, that is all I have.

Mr. Dovell: Just one other question.

Further Cross-Examination

By Mr. Dovell:

Q. Colonel, could these conversion kits have been obtained by the Guard from other sources than the Army? A. By that do you mean——

Q. I mean is there similarity in construction of trucks and trailers so that, from private companies, that such could have been obtained by the Guard without waiting for it from the Army?

A. I can answer it in this fashion, that the United States Army or the Government, I will put it that way, to [487] my knowledge is the only persons operating 24-volt vehicles with 24-volt electrical systems. That is a specific specification for military vehicles, tactical military vehicles, and I don't think that we, in fact I am quite positive, that we could not get any 24-volt equipment other than through the Army and I may further, to answer your question, we have no means of obtaining any equipment for the National Guard for the federally furnished equipment other than through federal supply channels. Now when I say federal supply channels, either by requisitioning or using federal funds to buy such equipment.

Q. If such was obtainable could you requisition

(Testimony of Lt. Col. Albert G. Hagen.)

funds? A. Probably, if such was obtainable.

Mr. Casey: I will submit that is hypothetical inasmuch as——

The Court: Of course it is very speculative unless something has been done of that character before, something of the kind; if you are just going to guess about it you had better not do that.

A. (Continuing): ——I am not going to guess because—I will answer it as——

Mr. Dovell: I will withdraw it.

The Court: Anything further?

Mr. Casey: Nothing further, your Honor. [488]

* * *

COLLOQUY ON ADMISSION OF EXHIBITS

Mr. Dovell: Rested provided I would like the understanding as to the exhibits that have been offered that the—I gathered the Court admitted the Government's exhibits?

The Court: All of the Defendant's Exhibits, A-1 to A-6, inclusive, have already been admitted during the course of the plaintiff's evidence.

Mr. Casey: No, your Honor, may I——

The Court: Is that not correct?

Mr. Casey: My understanding, your Honor, is that A-1, -2, -3 and -4 have been admitted, that in A-1 there was a part we were to delete. That has been delated, but that -5 and -6 have not been offered by the plaintiff.

The Court: Oh, very well. I have my notes and

they indicate the contrary, but I must be in error. What do your notes indicate?

The Clerk: A-1 to A-4, your Honor, has been admitted.

The Court: I am sorry, I make notes of those things and I misnoted, I guess. You then want to offer A-5 and -6?

Mr. Dovell: I will offer them, your Honor, and let the plaintiff's counsel raise his objections.

The Court: Yes, go ahead. [491]

Mr. Casey: If your Honor please, A-5 and A-6 as marked as Government's exhibits are, well, A-5 first, is an annual report of the Chief of the National Guard Bureau for the fiscal year ending 30 June, 1949, which I feel has no relevancy. It is not an order, Army directive or otherwise, but is merely, as I understand it, a report of what his National Guard is doing. And A-6 is the same thing for the fiscal year ending June 30, 1951.

The Court: What is the purpose of these exhibits?

Mr. Dovell: The main purpose is, your Honor, they were forwarded to me by the Department as exhibits and I——

The Court: That is not a very——

Mr. Dovell: I am offering them in deference——

The Court: Not very good——

Mr. Dovell: Superior opinions.

The Court: Not a very good ground for admitting them. I am going to refuse them. However, they will be marked and identified and in the record if by some miracle that is pertinent to the matter

it will be in the record for anyone who is interested to find and refer to, but A-5 and A-6, the objection to their admission is sustained.

(Defendant U. S. Government's Exhibits A-5 and A-6 rejected.)

Anything further from the United States?

Mr. Dovell: I believe that is all, your [492] Honor.

* * *

COURT'S ORAL REMARKS

(Designated Portion)

Now on the fact side of the Government's, as to the Government, there really isn't any fact issue of any consequence as far as the issuance of the truck and Brown's status and his getting the truck and while getting it following his duties as a unit caretaker—I am going to use that term rather than the longer later title and also because it is used in some of these cases. It is perfectly clear that a truck and trailer combination outfit weighing very great weights, I think the trailer was four ton without a load, wasn't it, something of the kind?

Mr. Casey: (Nods head.)

The Court: Very heavy piece of equipment being [549] hauled by this truck without brakes. Now even if there weren't a statute of the State of Washington requiring, making that unlawful, I think it would be difficult to escape a finding that it constituted negligence even in the absence of a statute. But be that as it may, the fact is that there

is a state and local, that is an ordinance of Tacoma making that kind, the operation of that kind of a combination of vehicles on the public highway unlawful and, of course, Hornbrook law that violation of such a statute is negligence per se.

Now the question is, how did it come about? Apparently it was not an accident or an inadvertence or overlooked. Col. Hagen said that the matter had been the subject of correspondence and of requests and what not for a long time. It had been pointedly called to the attention of the authorities that these National Guard units called for equipment that involved this kind of a dangerous and negligent and unlawful combination of vehicles on the highway. It is difficult for me to know from the evidence before me whose fault that was. In all likelihood it is one of those things that happen in governmental affairs when multiple governmental agencies are dealing with the same subject matter, they very frequently overlook the most obvious things and all ten of them work on the same problem. That is not uncommon. In all likelihood [550] it is just one of these things that happen that way.

Now the question is though, is there anywhere along the line that according to the evidence that I have before me where we can see negligence in permitting the vehicle to be on the highway at all? I think you may be under a misapprehension from the briefs that were given me as to the provisions of the Federal Tort Claims Act generally referred to as the Tort Liability Act, so I went back to the original act as it was originally enacted and it is

found in 60 Statutes at Large, page 842, and following. Now the pertinent part as far as we are concerned, reads as follows: "Subject of the provisions of this title the United States District Court of the district where the person injured or the accident occurred," I am paraphrasing there, "shall have exclusive jurisdiction to hear and determine and render judgment on any claim against the United States for money only accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury or death in accordance with the law of the place where the act or [551] commission occurred. Subject to provisions of this title the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances except that the United States shall not be liable for interest prior to the judgment, or for impunitive damages."

Now when they codified this they got the hind end to and the latter portion of this is now Section 276 and the prior part is a later section. So when you read it in the USCA it gives you an entirely different meaning if you read it in that order. You must read it in this order to understand what it means.

Now this has been commented upon by the United States Supreme Court in *Dalehite vs. U. S.*, 346 U. S. I think it starts at page 15, but particularly at page 40 where the Court—that, by the way, is the Texas City disaster cases. You have probably had some previous acquaintance with it, the terrible disaster when the ships blew up in the harbor down at Texas City and so on. Now this Dalehite case at that place points out that the statute requires a negligent act and it must be of an employee, and this Dalehite case points out that the mere fact that the Government may be operating an inherently dangerous commodity or engaging in an extra hazardous activity and so on, does not afford a basis of liability. So we have got to find an [552] individual employee of the Government negligent in order to permit the Court, in order to establish jurisdiction in the Court.

Now query: Is there an individual employee of the Government that can be chargeable with negligence in permitting this truck without brakes to, this trailer, I should say, without brakes, this combination of vehicles, to be on the highway in violation of state law?

Well, somebody in the army or the Department of the Army, as it is now called, I believe, authorized the issuance of this equipment, somebody wrote the directives, somebody issued the regulation and whoever that somebody was obviously was an employee of the Government and obviously was acting within the scope of his employment by the very nature

of the directive and regulation that was issued, at least I have got to assume that he had the authority to issue the regulations, they being full and fair upon their face.

I have grave doubts whether I can fasten liability on the United States on account of the doings of that somebody although I am firmly convinced that somebody erred, somebody was negligent in authorizing and permitting enormous vehicles of this kind to be issued and released upon the unsuspecting public.

Well, then, we get down to the next level below that [553] to the officer who released it, Col. Hagen. Of course, he is an army officer acting pursuant to orders. Query: Can an army officer who realizes that equipment is dangerous, who is presumed to know it is in violation of state law, who, pursuant to orders, releases equipment, can he be charged with negligence? Of course he wouldn't have any criminal liability under this Act because it would be absent. The fact he was acting under orders would eliminate intent so he wouldn't have any criminal liability under the Washington Act for having allowed the vehicle. But, of course, intent is not an element of negligence. A person can be grossly negligent and from the very best of intent and motives and often is. It is a serious question whether Col. Hagen who admittedly was acting as an employee of the Government in doing what he was done can be charged with negligence. And then we get down to the matter of Brown. What I have just said concerning the actions of Col. Hagen with respect to

releasing the vehicle would be applicable to Brown and his superiors insofar as their drawing them is concerned. They were acting under orders. Query: Can you act strictly in accordance with orders in a matter of this kind and yet be chargeable with negligence? The statute says anyone who operates a vehicle on the highway without these brakes is violating the law, that is, the Washington State statute so provides, and it is Hornbook law that a violation of state statute is [554] negligence per se. It isn't a question of intent. If Brown had been picked up and charged with having violated this Act, he undoubtedly could have successfully pleaded he was only doing what he was ordered to do. I don't know whether some Justice of the Peace would have accepted that defense, but ultimately somebody would have, I am sure. But the fact of his intent wouldn't be an important factor in the matter of whether or not he was negligent. I think in view of the fact that he was violating the law of the State of Washington in operating that vehicle without brakes, the kind of brakes required, that he was negligent ipso facto in driving the vehicle on the highway and there isn't any question, of course, about the casual relationship between the brakes, the lack of brakes and the happening of the accident.

Now we get down to the last and immediate question: Was Brown negligent in the handling of the equipment immediately prior to and at the time of the accident? He says he knew he had no brakes on the back end of that rig, fully familiar with its

weight, size, the difficulty of handling it. He knew he was traveling on a wet pavement and he was traveling on a street, heavily traveled street. It doesn't clearly appear here but there is some inference that Brown must have passed this very place on his way to the Camp Murray that morning and if so he must have had [555] actual constructive knowledge of the fact that the Telephone outfits were on the street. I don't think I'd have the right to charge him with that under the state of the evidence, but there is some inference to that effect. In any event, he is coming down there with a behemoth behind him that he knows he is going to have a tremendous problem of handling if he is faced with an emergency.

Now the Washington State law very emphatically charges every driver of a motor vehicle with the duty of anticipating the necessity of emergency stops. That is the law in the State of Washington. I could give you some cases just almost from memory. In other words, Brown was charged with the knowledge that somebody might be making repairs in the street, that somebody might be stalled, that the traffic light might change, that a pedestrian might come out. Keep in mind this was a pedestrian crossing and there was a big sign across the street indicating a pedestrian crossing right at this point which he could have seen for hundreds of feet back. Supposing somebody walked out across that street at that point as they had a perfect right to do in that pedestrian walk and under Washington law the driver would have been bound to yield the right-

of-way. Was he driving along there in a manner so as to enable him to keep this vehicle under control considering the condition it was in? I just am [556] bound to say that he was not, that if this outfit was as uncontrollable as he knew it to be and as subsequent events proved it to be, keeping in mind all in violation of law which he is presumed to know, then he was bound to proceed at such a rate of speed as he could control the vehicle and if that got down to two miles an hour or three miles an hour or five or whatever it was, that was his duty to travel at such a speed as he could keep this thing under control or reasonably could do so. And he didn't do that. I don't want to be harsh on Brown, probably a human being, maybe any of the rest of you would have done the same thing, but it still would have been negligence considering the enormous hazard to life and limb that was involved in it. So I am disposed to find Brown negligent in driving the truck on the highway in violation of state law and in particular in driving at the speed and in the manner that he had immediately prior to and at the time of the accident. There is no question, of course, but what his negligence was a direct moving proximate cause of the accident. I neglected to say that with respect to the Telephone Co. I am of the impression that even if you believe they were negligent in not having the signs further down or not having a flagman or not having cones or not having something else, that, I think, at most it would have been a condition and not a moving [557] cause. The moving cause of this accident was the

gross and inexcusable negligence of the Government's employees in operating a dangerous rig of this kind on the highways in violation of the state law. Whatever our views of state rights may be, that is carrying it too far.

Now those are my views of facts. Now my views of the law. I have already indicated some of my views of the law, namely, that we have got to have a body as distinguished from the United States, from the Government, as a non-physical being negligent. I don't think that the doctrine of the cases indicated in re statement of torts and in your corpus juris secundum that you called my attention to, namely, the liability of bailer for bailing out of a defective equipment and so on. I don't think that is applicable here because I think that we have got to have, we have got to have an individual employee of the Government negligent in order to fasten liability under this Act.

In analyzing the cases that have been called to my attention, I find in brief the following situation: The only cases cited to me dealing with a unit caretaker of a National Guard outfit comparable in status or identical in status unless there be some change in this later modification with Brown are U. S. vs. Holly, 192 Fed. (2d), 221, and U. S. vs. Duncan, 197 Fed. (2d), 233. Now in both of these cases the first Tenth Circuit and in the second the [558] Fifth Circuit it was held that a unit caretaker while engaged in the duties of his position with respect of caring for, serving and handling property, was an employee of the United States

and within the scope of his employment as such. In the Duncan case it happened that the facts were exactly identical. The unit caretaker there was returning to his National Guard unit with a truck which he had procured from a Government depot which is identical on the facts with our case, no room for any distinction at all, and in both of those cases, as I say, in both Holly and Duncan, the unit caretaker was held an employee within the scope of his employment. Those are the only circuit court cases that have been called to my attention that are exactly squarely on the point and both of them hold as I have stated.

Now in 206 Fed. (2d) 912, O'Toole vs. U. S., Judge Biggs speaking for the Third Circuit held a National Guardsman on summer training an employee, but the case involved a National Guardsman of the District of Columbia and Judge Biggs emphasizes the fact that residents of the District of Columbia and Guard units of the District of Columbia are a peculiar breed of animal and largely rested his decision on that circumstance, although he does refer to both Holly and Duncan with apparent approval. But I think under the circumstances the O'Toole case is not very controlling opinion, although as I say, Judge Biggs does indicate that he approves both Holly and Duncan. Now whether that brings the Third Circuit into the column of those holding a, who would hold a unit caretaker an employee acting within the scope of his employment or not, may be debatable, at least the strongest kind of inference is that that circuit is

going to hold that way when the question comes to them.

Now there are no circuit cases to the contrary. There are several circuit cases which hold that a National Guardsman other than a unit caretaker is not an employee and that I may say is held in both the Tenth and Fifth Circuits as well and apparently there is no authority to the contrary that a National Guard soldier, while not on active duty, on active federal duty, is not an employee within the meaning of this Act. Now there are a string of, oh I neglected to say that there is a District Court case *Watt vs. the U. S.*, 123 Fed. Supp. 906, District Court of Arkansas that applies the same rule although—and it is curious, it is an interesting case because in that case the unit caretaker was riding in the truck but it was being driven at the time by the unit administrative assistant and the District Court there says that both of them are employees, but that the administrative assistant did not have within his duties to drive the truck and even though the unit [560] caretaker was with him at that time, at the time held no liability because it was outside the scope of his employment. But the case doesn't add very much to it because after all that Court, that District Court is within one of the circuits and it doesn't mean very much in the way of authority when a District Court follows his own circuit.

Mr. Dovell: The Eighth Circuit, is it not, your Honor?

The Court: Is it?

Mr. Casey: A different circuit, your Honor. We checked in the beginning of the volume on that thing and this is Arkansas.

The Court: If it is a different circuit then it has a little more authoritative value than it would otherwise have because——

Mr. Casey: Eighth Circuit.

The Court: It is a fine point that isn't controlling in the situation but I just may comment on it because as far as I can see there isn't any circuit decision and there is this one District Court decision in this other circuit as you point out to me, all to the same effect. Now not any District Court case involves a unit caretaker. The District Court cases holding a National Guardsman as soldier who is not a unit caretaker I consider of no great help in our problem here [561] because that ruling is held even in those circuits that hold a unit caretaker an employee. The upshot of it all is that I don't see any authority to the contrary at the present time of controlling weight here. We don't have any decision in the Ninth Circuit, either District Court or from the Circuit itself on this question. I can't, of course, predict what the Ninth Circuit will do about it with accuracy, but I am of the impression that they will go along with the other circuits when the question comes to them. In any event for my part in it I am satisfied that the reasoning in *Holly and Duncan* is good, sound, in keeping with the meaning and intent of this Act and I am now of the impression that I should follow that line of authority. [562]

Certificate

I, Adele U. Douds, official court reporter for the within-entitled court, hereby certify that the foregoing is a true and correct transcript of the matters therein.

/s/ A. U. DOUDS.

[Endorsed]: Filed April 17, 1956; U.S.D.C.

[Endorsed]: Filed April 28, 1956; US.C.A.

[Title of District Court and Cause.]

Nos. 1747 and 1758

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 75(O) of the Federal Rules of Civil Procedure, as amended, and Subdivision I of Rule 10, as amended, of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith all of the original papers, pleadings and exhibits in the above-entitled consolidated causes, pursuant to the written Designation of the Contents of the Record on Appeal of the defendant United States of America, and the said papers, pleadings and exhibits herewith transmitted constitute the Record on Appeal from that certain

Judgment, in consolidated Causes 1747 and 1758, of the above-entitled Court, filed and entered on December 7, 1955, to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, and are identified as follows:

Cause 1747

1. Complaint. (Filed Nov. 4, 1953.)
2. Summons and Marshal's Return of Service. (Filed Nov. 17, 1953.)
3. Answer of Deft. Pac. Tel. & Tel. Co. (Filed Dec. 21, 1953.)
4. Motion to Consolidate (Causes 1747 and 1758). (Filed Apr. 30, 1954.)
5. Statement in Support Motion (1747 and 1758). (Filed Apr. 30, 1954.)
6. Affidavit of Service Motion, etc. (1747 and 1758). (Filed May 1, 1954.)
7. Note for Docket. (Filed July 1, 1954.)
8. Affidavit of Mailing. (Filed July 1, 1954.)
9. Interrogatories to Defendant. (Filed Aug. 13, 1954.)
10. Answers to Interrogatories. (Filed Sept. 22, 1954.)
11. Order of Consolidation (1747 and 1758). (Filed Oct. 19, 1954.)
12. Request for Subpoenas (1747 and 1758). (Filed Dec. 30, 1954.)
13. Motion for Order for Subpoena for Deposition (1747 and 1758). (Filed Dec. 30, 1954.)
14. Notice of Taking Depositions (1747 and 1758). (Filed Dec. 30, 1954.)

15. Deposition, Marvin G. Wubbens (1747 and 1758). (Filed Mar. 24, 1955.)

16. Deposition, W. L. Brown (1747 and 1758). (Filed Mar. 24, 1955.)

17. Deposition, Paul L. Froman (1747 and 1758). (Filed Mar. 24, 1955.)

18. Pre-trial Order (1747 and 1758). (Filed and entered Apr. 8, 1955.)

19. Trial Brief, Pac. Tel. & Tel. Co. (1747 and 1758). (Filed Apr. 14, 1955.)

20. Stipulation re medical expenses (1747 and 1758). (Filed Apr. 14, 1955.)

21. Reporter's Transcript of Court's Oral Opinion (1747 and 1758). (Filed May 27, 1955.)

22. Findings of Fact and Conclusions of Law (lodged Nov. 10, 1955) (1747 and 1758). (Filed and entered Dec. 7, 1955.)

23. Judgment (1747 and 1758) (lodged Nov. 10, 1955). (Filed and entered Dec. 7, 1955.)

24. Findings of Fact and Conclusions of Law, of Deft. United States (proposed but not signed) (1747 and 1758). (Lodged Nov. 10, 1955.)

25. Judgment, proposed by United States (1747 and 1758). (Lodged Nov. 10, 1955.)

26. Objections of United States to Plaintiffs' proposed Findings of Fact and Conclusions of Law (1747 and 1758). (Filed Nov. 10, 1955.)

27. Affidavit of Mailing Objections, etc. (1747 and 1758). (Filed Nov. 10, 1955.)

28. Amended Findings of Fact and Conclusions of Law, proposed by U. S. (1747 and 1758). (Lodged Nov. 14, 1955.)

29. Amended Objections of U. S. to Plaintiffs' proposed Findings of Fact and Conclusions of Law (1747 and 1758). (Filed Nov. 14, 1955.)

30. Affidavit of Mailing Amended Objections, etc. (1747 and 1758). (Filed Nov. 14, 1955.)

31. Cost Bill of Deft. Pac. Tel. & Tel. Co. (1747 and 1758). (Filed Dec. 12, 1955.)

32. Notice of Taxation of Costs (1747 and 1758). (Filed Dec. 12, 1955.)

33. Notice, U. S., of Appeal (1747 and 1758. (Filed Feb. 1, 1956.)

34. Order Extending Time to File Record and Docket Appeal (1747 and 1758). (Filed Feb. 21, 1956.)

35. Designation, U. S., of Record on Appeal (1747 and 1758). (Filed Apr. 16, 1956.)

36. Affidavit of Service of Designation (1747 and 1758). (Filed April 16, 1956.)

37. Reporter's Transcript of Trial Proceedings (2 volumes) (1747 and 1758). (Filed Apr. 17, 1956.)

38. Order to Transmit Original Exhibits (1747 and 1758). (Filed Apr. 25, 1956.)

Cause 1758

39. Complaint. (Filed Oct. 15, 1953.)

40. Summons and Marshal's Return of Service. (Filed Oct. 22, 1953.)

41. Stipulation for Change of Venue. (Filed Dec. 11, 1953.)

42. Answer of Defendant United States. (Filed Jan. 8, 1954.)

43. Affidavit of Mailing. (Filed Jan. 8, 1954.)

44. Motion to Strike Affirmative Defense. (Filed Jan. 27, 1954.)

45. Note for Docket. (Filed Apr. 6, 1954.)

46. Copy of letter, U. S. Attorney to Pltfs' attorneys re Motion to Strike. (Filed Apr. 12, 1954.)

47. Plaintiffs' Memo. Brief on Motion to Strike. (Filed Apr. 30, 1954.)

48. Motion to Consolidate Causes 1747 and 1758. (Filed Apr. 30, 1954.)

49. Note for Motion Docket. (Filed July 1, 1954.)

50. Interrogatories to Defendant. (Filed Aug. 13, 1954.)

51. Answers of U. S. to Interrogatories. (Filed Sept. 8, 1954.)

52. Affidavit of Mailing Ans. to Interrogatories. (Filed Sept. 8, 1954.)

53. Defendant's Memo in opposition to Plaintiffs' Motion to Strike. (Filed Sept. 24, 1954.)

54. Order Continuing Plaintiffs' Motion to Strike. (Filed Oct. 19, 1954.)

55. Motion of Plainiffs to Determine and Allow Attorney Fees. (Filed Dec. 12, 1955.)

56. Order Determining and Allowing Attorney Fees. (Filed Dec. 19, 1955.)

I further certify that as part of the Record on Appeal I am transmitting herewith the following original exhibits admitted in evidence in the trial of the above-entitled consolidated causes, to wit:

Plaintiffs' exhibits:

1. Photograph of truck and trailer.
2. Photograph of truck and trailer.

3. Photograph of plaintiff automobile.
4. Photograph of plaintiff automobile.
5. Photograph of plaintiff automobile.
6. Photograph of plaintiff automobile.
7. Certified copy of Dept. of Licenses Certificate of Weight.
8. Photostat copy of Army shipping document on truck.
9. Photostat copy of Army shipping document.
10. Photostat copy of Army shipping document.
11. Photostat copy of Army shipping document.
12. Photostat copy of issue slip.
13. Photostat copy of issue slip.
14. Photostat copy of issue slip for director.
15. Photostat copy of 13 sheets of special orders.
16. Mim. copy of Rev. Field Civ. Personnel Program, Prj. 1213 (17 pages).
17. Hospital records and ex-ray file of Pltf., prop. of Pierce County Hospital.
18. Large map.
19. Envelope contain. 10 small photos re accident.
20. X-ray film and hospital record of Pltf., from St. Peters Hospital.
21. X-ray film and hospital records of pltf. from Providence Hospital.
22. Bills (2) for service, Providence Hospital.
23. National Guard Reg. #75-16 (6 pages).
24. Photostat copy of Dept. of Army, etc.
25. Bills for medical service (10 pages).
26. Nursing bills, Pierce Co. (6 pages).
27. Drug bills (3 pages).

28. Bills, Dr. Zimmerman; 1 cancelled check.
29. Bill (1), St. Peters Hospital.
30. Pierce County Hospital bill (1).
31. Bill, Dr. Derring, dentist.
32. Encephlogram Report of Pltf.
33. Original report of Dr. Thomas.
34. Bills (5 pages).
35. Bills, Dr. MacKay.
36. Army Div. Statistics Letter.

Exhibits of Deft. Pac. Tel. & Tel. Co.:

B-1. Large sketch of area.

B-2 to B-8, inclusive: Photographs.

Exhibits of Deft. United States:

A-1. Photostat copy (9 sheets) of insurance documents, etc.

A-2. Certified copy of Army Regulations, Special Regulations, Cir. No. 34 and General Order.

A-3. Certified copy NGR.

A-4. Certified copy NGR circulars.

A-5. Certified copy Annual Report, Chief Natl. Guard Bureau.

A-6. Certified copy Annual Report, NGR, ending 6/30/51.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the parties hereto for the preparation of the Record on Appeal in these consolidated cases, to wit: Notice of Appeal, Defendant United States of America,

\$5.00, and that the said fee has not been paid for the reason that the appeal is being prosecuted by the United States of America.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court, at Tacoma, Washington, this 26th day of April, 1956.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ E. E. REDMAYNE,
Deputy.

[Endorsed]: No. 15,116. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Mar-Le Wendt, Albert D. Rosellini and Pacific Telephone & Telegraph Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed April 28, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15,116

UNITED STATES OF AMERICA,

Appellant,

vs.

MAR-LE WENDT AND ALBERT D. ROSEL-
LINI,

Appellees.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

The United States of America, appellant, states that the points on which it intends to rely are as follows:

1. The District Court erred in holding that Sgt. William Brown and Lt. Col. Hagen were federal employees within the meaning of that term as used in the Federal Tort Claims Act.

2. The District Court erred in holding that Sgt. Brown and Lt. Col. Hagen were acting within the scope of their employment for the United States within the meaning of the Federal Tort Claims Act.

3. The District Court erred in holding that Sgt. Brown and Lt. Col. Hagen were negligent.

4. The District Court erred in refusing to admit inot evidence Government's Exhibits A5 and A6.

5. The District Court erred in rendering judgment for the plaintiffs against the United States.

CHARLES P. MORIARTY,
United States Attorney,

By /s/ GUY A. B. DOVELL,
Assistant United States At-
torney.

[Endorsed]: Filed April 25, 1956; U.S.C.A.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD
TO BE PRINTED

The United States of America, appellant, designates the following parts of the record for printing by the Clerk:

1. Plaintiffs' complaint against the United States.
2. Order transferring cause, filed December 12, 1953.
3. Answer of United States.
4. Plaintiffs' motion to strike Government's first affirmative defense.
5. Answers of United States to interrogatories, filed September 8, 1954.
6. Government's memorandum in opposition to plaintiffs' motion to strike Government's first affirmative defense.

7. Order of consolidation, filed October 19, 1954.

8. Pre-trial order.

9. Transcript of proceedings April 11 through April 14, 1955. All the testimony of Lawrence Brown (pp. 56 through 112, inclusive); Lt. Col. Albert G. Hagen (pp. 466 through 488, inclusive); Capt. Marvin Glen Wubbens (pp. 170 through 193, inclusive); and Gen. Wilburn H. Stevens (pp. 194 through 248, line 6, inclusive).

Colloquy on admission of Exhibits, p. 491, line 2, through p. 492, line 25.

Court's oral remarks, p. 549, line 14, through p. 562, line 13.

10. Transcript of court's oral opinion April 14, 1955, p. 4, line 11, through p. 5, line 4.

11. Findings of fact, conclusions of law and judgment entered on December 7, 1955.

12. Notice of appeal.

13. Designation of record on appeal.

14. Statement of points on which appellant intends to rely.

15. This designation of parts of record to be printed.

CHARLES P. MORIARTY,

United States Attorney,

By /s/ GUY A. B. DOVELL,

Assistant United States Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed April 25, 1956; U.S.C.A.